TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 84.

CHARLES McINTIRE, APPELLANT AND PLAINTIFF IN ERROR,

vs.

EDWIN A. McINTIRE, ADMINISTRATOR C. T. A. OF DAVID McINTIRE.

No. 85.

EDWIN A. McINTIRE, ADMINISTRATOR, C. T. A. OF DAVID McINTIRE, ET AL., APPELLANTS AND PLAINTIFFS IN ERROR,

vs.

CHARLES McINTIRE.

APPEALS FROM AND IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

PRINTED FOR THE COURT.

(18,604 & 18,605.)

(18,604 & 18,605.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 376.

CHARLES McINTIRE, APPELLANT AND PLAINTIFF IN ERROR,

vs.

EDWIN A. McINTIRE, ADMINISTRATOR *C. T. A.* OF DAVID McINTIRE.

No. 377.

EDWIN A. McINTIRE, ADMINISTRATOR *C. T. A.* OF DAVID McINTIRE, ET AL., APPELLANTS AND PLAINTIFFS IN ERROR,

vs.

CHARLES McINTIRE.

APPEALS FROM AND IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption	a	a
Transcript from the supreme court of the District of Columbia	1	1
Entries in administration docket	1	1
Affidavit filed with will of David McIntire	5	5
Will of David McIntire	5	6
Findings of jury	7	7

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 30, 1902.

	Original.	Print
Bond of E A. McIntire	8	8
Order to pay money and securities into court, &c.	9	9
Award of arbitrators	10	11
Order ratifying award of arbitrators	13	13
Petition of Sarah McIntire *et al.*	13	14
Order directing register to deliver assets	15	16
Order admitting contested paper-writing to probate	16	17
Consent order substituting C. Carlisle as one of the custodians of the fund, &c.	16	17
Petition of S. S. Henkle for allowance of attorney's fees	17	18
Order to pay S. S. Henkle $5,000	17	18
Amended order allowing S. S. Henkle counsel fees	18	19
Order substituting Enoch Totten as one of the custodians of assets	19	20
Petition of Sarah McIntire *et al.* for payment of $500 to their proctor	19	20
Order granting petition of Sarah McIntire *et al.*	20	21
Petition of Sarah McIntire *et al.* for payment of counsel fees	21	22
Order allowing petition to pay counsel fees	22	23
Mandate from Supreme Court of the United States	23	24
Petition of Sarah McIntire *et al.* for further payment to counsel.	24	25
Order authorizing custodians to pay counsel fee to Enoch Totten	25	26
Report of Enoch Totten and Calderon Carlisle, custodians	26	27
Order approving custodians' report	29	30
Order authorizing delivery of assets to administrator, &c.	30	31
Bond of E. A. McIntire	31	32
Petition of Martha McIntire *et al.* for partial distribution	32	33
Amended second and final account of E. A. McIntire, administrator	33	34
Approval of second and final account of E. A. McIntire, administrator	35	36
Exceptions to amended second and final account of administrator	35	36
Order for partial distribution (consent)	37	38
Order overruling exceptions	38	39
Appeal	39	40
Order fixing amount and method of security for costs on appeal	39	40
Order extending time for filing transcript	40	41
Order modifying order of March 5, 1898	40	41
Order further extending time to file transcript	41	42
Certified copy of docket entries (law, 27815)	42	42
Mandate from Court of Appeals, D. C.	44	44
Affidavit of Edwin A. McIntire	47	45
Emma T. McIntire	48	46
Second and final account of E. A. McIntire, administrator	49	46
Exceptions of Charles McIntire to account	57	52
Exceptions of E. A. McIntire to account	58	52
Decree and appeals	60	53
Appeal bond of Charles McIntire	62	54
Appeal bond of E. A. McIntire *et al.*	63	55

	Original.	Print
Stipulation as to facts and as to record on appeals	64	56
Certificate of register of wills and clerk of probate court	68	58
Motion to dispense with printing record, &c.	69	59
Stipulation to dispense with printing record, &c.	70	60
Order dispensing with printing record and submitting cause	71	61
Opinion	72	61
Decree	73	62
Order allowing appeal and writ of error of Charles McIntire	74	62
Writ of error sued out by Charles McIntire	75	62
Order allowing appeal and writ of error of E. A. McIntire *et al.*	76	63
Writ of error sued out by E. A. McIntire *et al.*	77	63
Bond of Charles McIntire	78	64
Citation on appeal of Charles McIntire	80	65
Citation on writ of error sued out by Charles McIntire	81	65
Bond of E. A. McIntire *et al.*	82	66
Citation on appeal of E. A. McIntire *et al.*	84	67
Citation on writ of error sued out by E. A. McIntire *et al.*	85	67
Clerk's certificate	86	68
Stipulation for addition to record	87	68
Opinion of the Court of Appeals of the District of Columbia in case of McIntire *vs.* McIntire, 14 App. D. C., 337	88	68

Court of Appeals, District of Columbia.

APRIL TERM, 1902.

CHARLES McINTIRE, Appellant,
vs.
EDWIN A. McINTIRE, Administrator *c. t. a.* of David McIntire. } No. 1214.

and

EDWIN A. McINTIRE, Administrator *c. t. a.* of David McIntire; Edwin A. McIntire, Martha McIntire, Emma T. McIntire, and Elizabeth M. Test, Appellants,
vs.
CHARLES McINTIRE. } No. 1215.

Appeals from the supreme court of the District of Columbia.

Filed May 5, 1902.

1

1532.

Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

No. 1532.

Estate of David McIntire, Late of the District of Columbia; Died April 1st, 1884, Testate.

Legal representatives.	Amount of bond.	Sureties.	Solicitors.
Edwin A. McIntire, administrator, c. t. a.	$8,000.	Emma T. McIntire. Martha McIntire.	Hanna & Johnston. Newton & Berryman. S. S. Henkle. Wm. G. Johnson.
	$100,000 (additional bond executed July 9th, 1896).	The American Bonding and Trust Company of Baltimore City.	

Date.		Proceedings.
1884.		
April	8	Will filed and affidavit of Wm. T. Galliher, A. Laura Galliher, Emma V. McIntire, and Edwin A. McIntire.
		Handwriting of decedent proved by above-mentioned parties.
	11	Petition of Martha McIntire, praying that Edwin A. McIntire be appointed administrator c. t. a., and assent of three other heirs thereto.
	12	Order admitting will to probate and granting letters of administration c. t. a.
	"	Bond executed and letters issued. Notice to creditors issued.
1885.		
Jan'y	26	Inventory of personal estate returned by adm'r c. t. a., $47,987.20.
		Order of court directing adm'r c. t. a. to turn funds of estate over to
Feb'y	19	register of wills.
April	7	Award of arbitrators, Campbell G. Berryman & James M. Johnston, pursuant to order passed herein Feb'y 19th, 1885.
	17	Final notice issued appointing May 15th, 1885, for settlement.
	*25	Order ratifying the award of the arbitrators.
June	5	Petition of Charles McIntire, brother, to have probate of will set aside and issues framed and sent to circuit court for trial by jury.
	"	Rule vs. adm'r c. t. a. and the legatees, returnable June 19th, 1885.
	9	Service acknowledged by Hanna & Johnston, Newton & Berryman, att'ys.
2		
July	17	Consent order extending time for filing answer to July 31, 1885.
	"	Answer of E. A. McIntire, adm'r c. t. a., to rule to show cause why probate of will should not be set aside filed.
	31	Answer of Martha McIntire, Emma T. McIntire, and Sarah McIntire to the rule to show cause filed.
	"	Answer of Elizabeth McIntire Test to the rule to show cause filed.
*May	15	First and final account of adm'r c. t. a. filed.

Date.	Proceedings.
Aug. 5	Petition of Martha, Emma T., and Sarah McIntire for partial distribution filed.
Nov. 20	Amended petition of Charles McIntire for issues to contest will, &c., filed.
1886.	
Jan'y 8	Motion to strike from the files the amended petition of Chas. McIntire for issues to contest will.
Feb. 24	Order requiring respondents to answer amended petition.
M'ch 5	Petition of Sarah McIntire *et al.*, praying the court to allow S. S. Henkle, Esq., att'y, $500.
"	Order directing the register of wills to pay the same.
6	Appeal by respondents from order of Feb'y 24th, 1886. Receipt of S. S. Henkle for $500 endorsed on order of 5th inst.
8	Motion to vacate order of M'ch 5, '86, and to require payment into court filed.
8	Order allowing James M. Johnston, att'y, to withdraw papers from the files.
"	Motion to place cause on the calendar and to dismiss appeal filed.
June 16	Motion of Jas. M. Johnston, att'y, to dismiss appeal to gen'l term filed with 10 copies of record.
23	Motion to reinstate appeal filed and order overruling motion and directing same to stand dismissed.
25	Answers of Edwin A. McIntire and Elizabeth McIntire Test *et al.* filed.
July 2	Order directing issues to be transmitted to circuit court for trial by jury. Note of appeal.
19	Appeal bond filed.
1886.	
Aug. 13	Order directing register of wills (Ramsdell) to deliver assets of estate to solicitors.
17	Receipt of S. S. Henkle and William G. Johnson, att'y, for assets, $51,731.60, turned over to them by register of wills, filed and recorded in Receipt Book E. N. R. No. 1, folio 323.
20	Report of H. J. Ramsdell, register of wills, in relation to assets paid into the registry of the court filed.
Oct. 22	Order disallowing claim of H. J. Ramsdell and directing him to refund $431.42 to sol'rs.
23	Appeal of H. J. Ramsdell from order of October 22nd, 1886.
Nov. 16	Decree in general term affirming order of the special term of July 2d, 1886.
1887.	
Mar. 4	Inventory of money and list of debts pertaining to estate of David McIntire, dec'd, filed.
June 30	Consent order of court authorizing attorneys to invest assets filed.
1888.	
June 22	Order requiring adm'r c. t. a. to pay to Johnston & Henkle dividends, &c., & to settle acc't on or before Friday, June 29, 1888.
June 26	Copy of record from circuit court, D. C., and motion to annul & set aside probate of will, &c., filed.
29	Order overruling motion; appeal noted: also additional acc't of adm'r c. t. a. filed, with vouchers attached.
1889.	
July 12	Order authorizing the purchase of new stock of the Penna. R. R. Co. at par.
3	
1891.	
Jan'y 15	Findings of jury sustaining will filed.
30	Motion of caveatees to affirm the decree of April 24th, 1884, admitting will to record, filed.
Feb'y 6	Objections to motion for judgment on verdict & motion for new trial on issues filed.

Date.	Proceedings.
9	Order overruling objections & denying motion for new trial and admitting will to probate and record.
12	Appeal taken from the order of the 9th inst., entered herein, filed.
27	Additional account of Edwin A. McIntire, adm'r c. t. a., filed. (Third account.)
M'ch 10	Exceptions to account of Edwin A. McIntire, adm'r c. t. a., filed.
13	Petition of 4 of the legatees for an order to turn assets over to adm'r c. t. a. Order of reference to auditor.
1891.	
March 21	Order on S. S. Henkel and Jas. M. Johnston to turn assets over to adm'r c. t. a.
23	Appeal to general term from order of M'ch 21st, 1891, filed.
24	Motion to fix supersedeas filed and order suspending order of 21st inst.
30	Order dated M'ch 28th, continuing hearing of motion to April 4th, filed.
1892.	
May 2	Auditor's report filed.
June 29	A typewritten paper, 5 pages, sent here by clerk of the court, endorsed as follows, viz: "In the Supreme Court of the District of Columbia, in general term. *In re* estate of David McIntire. Orphans' court, No. 1532, calendar No. 212. Answer of caveator to motion to dismiss. Filed June 29, 1892. J. R. Young, clerk," and returned to clerk's office by Mr. Gatley.
July 16	Decree of general term dismissing appeal taken from order of Feb'y 9, 1891, filed.
Oct. 4	Order of counsel to issue writ of error and certificate of Mr. Justice Hagner declining to sign a citation in aid of a writ of error, &c., and copy of writ of error lodged in clerk's office.
Dec. 2	Petition of Jas. M. Johnston, custodian of est., and order substituting Calderon Carlisle.
1893.	
M'ch 17	Petition of Calderon Carlisle for authority to collect dividends on P. R. R. stock filed.
July 15	Notice of motion for collection of dividends & to invest cash belonging to estate.
18	Orders to collect dividends and invest $17,500 in 1st-mortgage real-estate securities.
"	Petition of S. S. Henkle for $5,000 on ac. of counsel fees filed.
22	Order to pay S. S. Henkle $5,000 out of funds in hands of custodians.
31	Amended order allowing S. S. Henkle counsel fees.
"	Order to invest $10,000, with four (4) exhibits, filed.
1893.	
Aug. 24	Order directing investment of $5,000 in note of Chas. C. Duncanson.
1895.	
July 3	Order substituting Enoch Totten for S. S. Henkle as one of the custodians of the assets.
12	Petition of Sarah McIntire *et al.* for payment of $500 to Enoch Totten and order granting same.
1896.	
Jan'y 28	Petition of Sarah McIntire *et al.* for payment of counsel fee to Enoch Totten filed.
Jan'y 28	Order of court allowing same.
March 17	Petition requesting the sending of original will to Chief Justice of the U. S. filed.
"	Order directing same.
4	
May 15	Mandate of the Supreme Court of the United States affirming decree of general term with costs filed.
June 1	Petition of Sarah McIntire *et al.* for further payment of counsel fees filed.
"	Order authorizing same.

Date.	Proceedings.
June 26	Petition of adm'r c. t. a. to give additional bond.
"	Report of Enoch Totten and Calderon Carlisle, custodians of estate, filed; recorded, acc'ts #35, J. N. McG., folio 194.
July 7	Order passing and approving account of Enoch Totten and Calderon Carlisle.
"	Order authorizing delivery of assets to administrator c. t. a. and fixing additional bond of adm'r c. t. a. @ $100,000.
9	Additional bond executed.
1896.	
Dec. 18	Second & final account of administrator c. t. a. approved and passed, acc'ts #36, J. N. McG., folio 71.
22	Supplemental account of adm'r c. t. a. filed.
1897.	
Jan. 9	Exceptions to account of adm'r c. t. a. filed.
April 8	Petition of adm'rs of estate of S. S. Henkle for allowance for services of S. S. Henkle, as custodian, filed.
June 2	Answer of Enoch Totten to petition of administrators of estate of S. S. Henkle filed.
"	Petition of Martha McIntire *et al.* for partial distribution filed.
Aug. 2	Amended second and final account of administrator c. t. a. filed.
Oct. 5	Notice of motion for approval of account of adm'r c. t. a filed.
Oct. 22	Exceptions to amended second and final account filed.
Dec. 9	Consent order for partial distribution by administrator c. t. a.
1898.	
Feb. 11	Order of court, with assent of parties for conversion of scrip and sale of Northern Pacific Railroad Company stock.
March 5	Order overruling exceptions to amended second and final account of administrator c. t. a. filed.
10	Appeal to the Court of Appeals by Charles McIntire, Jr., from the order of court passed March 5th, 1898, overruling exceptions to the account of administrator c. t. a. filed.
11	Order correcting order of sale of 42 shares stock Northern Pacific Railway Company.
24	Order fixing security for costs and authorizing deposit of $200 therefor on appeal in lieu of bond.
April 5	Order extending time for preparing and filing transcript on appeal of Charles McIntire.
May 4	Amended second and final account filed herein August 2nd, 1897, this day approved and passed by the court *nunc pro tunc* as of March 5th, 1898.
"	Order *nunc pro tunc* modifying order of March 5th, 1898, so as to approve account and direct distribution thereunder.
"	Order extending time for filing transcript in Court of Appeals.
Nov. 2	Copy of order of Court of Appeals D. C. directing certain papers to be sent there and receipt of Robert Willett, clerk for same, filed.
1899.	
M'ch 4	Papers delivered to Robert Willett, clerk, returned by him.
31	Mandate from Court of Appeals, filed.
1900.	
Jan. 19	Restatement of second and final acc't of adm'r c. t. a. under mandate of Court of Appeals, filed with Exhibits #1 and #2.
1901.	
April 11	Rule *vs.* Edwin A. McIntire, adm'r c. t. a., to show cause issued.—Return day April 11th 1901.
16	Rule *vs.* Edwin A. McIntire adm'r returned copy served personally on April 16, 1901.
May 24	Petition of Charles McIntire Jr. that administrator be required to avail himself of stock privilege of Penna. R. R. filed.
June 11	Answer of Edwin A. McIntire to petition of Charles McIntire filed.
12	Order authorizing adm'r c. t. a. to sell stock privilege Penn. R. R. and to collect coupons.
"	Order authorizing adm'r c. t. a. to pay to register of wills $44.02 as security for costs.

Date.	Proceedings.
July 16	Petition of Edwin A. McIntire *et al.* for leave to pay William Henry Dennis and Davis & Tucker the sum of $2500 for counsel fees, and for leave to have said sum charged against the estate filed.
5	
July 16	Order authorizing Edwin A. McIntire to pay to William Henry Dennis and Davis & Tucker the sum of $2500, and to have said sum charged against the estate.
"	Consent of Carlisle & Johnson, attorneys for Charles McIntire.
Nov. 26	Stipulation and agreement for partial distribution filed.
"	Order authorizing adm'r c. t. a. to make a further partial distribution.
1902.	
Mar. 21	Second and final account of adm'r c. t. a. restated in accordance with mandate of Court of Appeals filed for approval. Acc'ts #48 folio 307.
"	Exceptions of Charles McIntire Jr. to account of adm'r c. t. a. filed.
"	Exceptions in behalf of adm'r c. t. a. filed.
"	Order overruling exceptions, approving and passing account and allowing cross-appeal and fixing supersedeas bond at $100.
Apr. 9	Appeal bond of Charles McIntire filed and approved.
1902.	
Apr. 23	Stipulation as to what shall constitute transcript of record on appeal etc. filed.
"	Appeal bond of Edwin A. McIntire, adm'r c. t. a. *et al.*, filed and approved.
26	Certified copy of docket entries in suit at law No. 27815 McIntire vs. McIntire filed.

DISTRICT OF COLUMBIA, *ss:*

On the eighth day of April, A. D. 1884, came William T. Galliher, A. Laura Galliher, Emma V. McIntire, and Edwin A. McIntire and made oath on the Holy Evangels of Almighty God that they do not know of any will or codicil of David McIntire, late of said District, deceased, other than the instruments of writing hereto attached; that the deceased departed this life early on the morning of the 1st day of April, A. D. 1884, at the house of the affiant, William T. Galliher, and that these papers were discovered in a tin case in the chest late the property of the decedent; that they are now and have been for years past well acquainted with the handwriting of the deceased, and they believe the entire writing and signatures are in his handwriting.

WILLIAM T. GALLIHER.
A. LAURA GALLIHER.
EMMA V. McINTIRE.
EDWIN A. McINTIRE.

Sworn to and subscribed before me this 8th day of April, 1884.

[SEAL.]

M. J. GRIFFITH,
Notary Public, D. C.

JANUARY 7TH, 1880.

This my last will and testament.

I David McIntire. tin-plate worker, of this city (of) * do will, bequeath. or devise, to my nephews, and nieces, that is to say, from July the first. 1st eighteen hundred and fifty-four. 1854

To the opening of. or reading of this, paper. one thousand three hundred and fifty dollars and sixty-four cents ($1,350.64) is to be calculated at six 6 per cent. interest

That amount whatever it may be is to be given to each of my Brother Edwin's children. The remainder if any, is to be equally divided between my Brothers Edwin and Charles children.

DAVID McINTIRE. [SEAL.]

The judges of the courts, lay it down as a rule in law, that, what a person leaves in his, handwriting, with his name attached, is his, will, and it is the law. The law, requires no particular formality in action, or words to constitute a valid will or request.

DAVID McINTIRE.

JAN'Y 1, 1880.

At my death, or after, I wish my body, to be taken to Philadelphia, and deposited in the "Macphelah," cemetery "vault" with the cover unscrued, and remain in that condition, until friends, or ralatives, are satisfied, and then deposited, in the lot with the other graves. And providing "Macphelah cemetery" should be sold, and a disposition made of those in the family lot, by the family, then the instruction as stated above is to follow that disposition.

DAVID McINTYRE, OR TIRE.

6 To provide for the demise when it should come, to the Great Proprietor of All.

My clothing is to go — those that they fit.

If there is more than one, a rough estimate is to be made and divided so, recipients may have a word and be satisfied nephews first — degree. I do not leave them as a legacy they must take them as their own. To avoid trouble, *i. e.*, not of any account whatever. To those that I appoint to settle see that those things are carried out.

D. McINT.

You must act u-derstandingly there will be no money in bank. To give satisfaction to all interested. Provided the surrounding should be disturbed. That is the names I have written down with the articles [names]* attached to them. It is my intention that they take them as their own.

If the articles are worth having.

DAVID McINTIRE.

(* Words in brackets erased in copy.)

To Lizzie McIntire Test as she is raising more boys. Hence my chest with all my clothing or wearing apparel coat, vest, pants, shirts, drawers, socks &c.

The large double shawl the veg-table studs goes with the shirts.

The sewing apparatus the 5 glass-stopper vials.

To Emma V. the writing desk with all the writing apparatus, pens, ink, paper, envelopes, pencils. The cotton muf-ler, red silk handkerchief and gold studs.

To Chas. McIntire Jr. the telescope gun, and one pocket-knife, Webster's Dictionary and pocket-book.

The linen pocket handkerchief to Normy.

The sa-che. & strap, Martha, Addyline, Emma.

Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

APRIL 8TH, 1884.

This day appeared William T. Galligher, A. Laura Galligher, Emma V. McIntire, and Edwin A. McIntire and made oath on the Holy Evangels of Almighty God that they and each of them are well acquainted with the handwriting of David McIntire, late of the District of Columbia, deceased; that the annexed and foregoing instrument of writing, purporting to be the last will and testament of said deceased, is wholly in the handwriting of said deceased, and, further, that it is well known to them that said David McIntire has departed this life.

Test: H. J. RAMSDELL,
Register of Wills.

7 *Findings of Jury. Filed January* 15, 1891.

In the Supreme Court of the District of Columbia.

CHARLES MCINTIRE, Pl't'f & Caveator,
vs.
EDWIN A. MCINTIRE ET AL., Def'ts and Caveatees.
} At Law. No. 27815. Issues from Probate.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited on Wednesday last, who, after the case was given them in charge, on their oath say:

As to the first issue, "Was the paper-writing as now probated and now bearing date January 7th, 1880, purporting to be the last will and testament of said David McIntire, deceased, executed by the said David McIntire in due form as required by law?" they answer, Yes. As to the second issue, "Was the said David McIntire, at the time of the alleged execution of the said paper-writing as now probated and now bearing dated January 7th, 1880, of sound and disposing mind and capable of making a valid deed or contract?" they

answer, Yes. As to the third issue, "Were the contents of said paper-writing, as now probated and bearing date January 7th, 1880, read to or by the said David McIntire or otherwise made known to him at or before the execution thereof?" they answer, Yes. As to the fourth issue, "Was the said paper-writing, as now probated and now bearing date January 7th, 1880, executed by the said David McIntire under the undue influence or by the fraud of any person or persons?" they answer, No. As to the fifth issue, "Is the said paper-writing, as now probated and now bearing date January 7th, 1880, the complete and final last will and testament of the said David McIntire?" they answer, Yes. As to the sixth issue, "Has the said paper-writing purporting to be the last will and testament of the said David McIntire, deceased, probated on the 8th day of April, 1884, or any part thereof, been fraudulently altered since the death of said David McIntire and before the probate thereof by any person or persons to the prejudice of any of the next of kin or heirs-at-law of said David McIntire?" they answer, No. As to the seventh issue, "Has the said instrument purporting to be the last will and testament of said David McIntire, deceased, been in any respect altered since the death of said David McIntire, and, if any such alterations have been made, what were the said alterations and how were they made, and were such alterations made by any party interested under said will or with the privity of any person interested under said will?" they answer, No. As to the eighth issue, "Has the said instrument purporting to be the last will and testament of said David McIntire, deceased, or any part thereof been revoked?" they answer, No; and the court orders the clerk to certify said answers to the court from whence they came.

8 A true copy of the minute entries in the above-entitled cause, M. 24, p. 157.

Test: R. J. MEIGS, *Clerk*,
[SEAL.] By H. W. HODGES, *Ass't Clerk*.

Endorsed: No. 1532. D 11. *In re* estate of David McIntire, deceased. Findings of jury. At law. No. 27815. Certified, transmitted, and filed by the clerk of said court sustaining will. Filed Jan. 15, 1891. L. P. Wright, register of wills, District of Columbia.

22. 1532*e*.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

Know all men by these presents that we, Edwin A. McIntire, Emma T. McIntire, and Martha McIntire, of the District of Columbia aforesaid, are held and firmly bound unto the United States of America in the full sum of eight thousand dollars, current money of said States, to be paid to the said United States, their certain attorneys, or assigns; to which payment, well and truly to be made,

we bind ourselves and each of us, our and each of our heirs, executors, and administrators, in and for the whole, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of April, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas the above-bounden Edwin A. McIntire is about taking out from the supreme court of the District of Columbia letters of administration c. t. a. on the personal estate of David McIntire, late of the District of Columbia, deceased:

The condition of the above obligation is such that if the above-bounden Edwin A. McIntire shall well and truly perform the office of administrator c. t. a. of David McIntire, late of the District of Columbia, deceased, according to law, and shall in all respects discharge the duty of him required by law as administrator c. t. a. aforesaid, without any injury or damage to any person interested in the faithful performance of the said office, then the above obligation shall be void; it is otherwise to be in full force and virtue in law.

EDWIN A. McINTIRE. [SEAL.]
EMMA T. McINTIRE. [SEAL.]
MARTHA McINTIRE. [SEAL.]

Signed, sealed, and delivered in the presence of—
M. J. GRIFFITH.

Approved:
W. S. COX, *J.*

9 DISTRICT OF COLUMBIA, *To wit:*

I, Edwin A. McIntire, do swear that I will well and truly administer the goods, chattels, personal estate, and credits of David McIntire, late of the District of Columbia, deceased, to the best of my knowledge, according to law, and will give a just account of my administration when thereto I shall be lawfully called, so help me God.

EDWIN A. McINTIRE.

Sworn and subscribed before me this 12th day of April, A. D. 1884.

Test:
H. J. RAMSDELL,
Register of Wills.

Order. Filed February 19, 1885.

In the Orphans' Court of the District of Columbia.

In re Estate of DAVID MCINTIRE, Deceased.

Counsel for Charles McIntire, Jr., and Annie Laura Galliher, Wm. E. McIntire, David E. Holmes (next friend for Emma V. McIntire and Henry V. McIntire), and counsel for Martha, Emma T., and Adaline McIntire and Elizabeth Test, and for Edwin A. McIntire,

the administrator heretofore appointed by this court, consenting, it is, this nineteenth day of February, 1885, ordered:

1. That said Edwin A. McIntire shall act as administrator of said David McIntire, but without any allowance for commission or other charge for his services as such administrator.

2. It being claimed by said Charles McIntire, Jr., and Annie Laura Galliher, William E. McIntire, and David E. Holmes (next friend for Emma V. & Henry V. McIntire), that, in addition to the bonds, stocks, money, and other assets of said estate now paid into this court under the decree passed this 19th day of February, 1885, in cause entitled Charles McIntire, Jr., and others *vs.* Edwin A. McIntire and others, No. 9330 of the equity dockets of this court, the sum of $10,000 has been received by the said Edwin A. McIntire, administrator of said David McIntire, and should have been included by him in the inventory filed by him as such administrator and accounted for by him as such administrator; and it being claimed by the said Edwin A. McIntire that he never received said additional sum or any part thereof, it is further ordered that the said controversy be, and the same is hereby, submitted to the decision and arbitration of Campbell G. Berryman, James M. Johnston, and James G. Payne, or any two of them; that the said arbitrators shall proceed forthwith to hear all the proofs and allegations which the parties may adduce of and concerning the said controversy, and that the decision which they or any two of them may make in writing in the premises, under their hands, shall be returned into this court; and if the said decision shall find that the said Edwin A. McIntire has received or ought to account for
10 the said sum of $10,000, thereupon it is ordered that the entire share of the said Edwin A. McIntire, as legatee and distributee in the whole estate of said David McIntire, or so much thereof as may be necessary, shall be retained, appropriated, and applied by this court to the payment to the said estate of said sum of $10,000, and interest thereon from the time when the same was found by said arbitrators to have been received by him, or from which he was accountable to said estate for the same; and if the said share should be found insufficient to pay the said sum of $10,000 in full, and any interest thereon, as aforesaid, then the said Edwin A. McIntire shall forthwith pay into this court, in cash, the additional sum necessary to make up any such deficiency.

3 And it is further ordered that if for any reason it shall appear to this court that the said share of the said Edwin A. McIntire, as distributee and legatee of the said estate, may not be applicable to the payment of said sum of $10,000 and interest, as aforesaid, in whole, as above mentioned, or that for any reason the said indebtedness to be found, as aforesaid, cannot be set off against his said share in said estate, then it is ordered that the said Edwin A. McIntire shall thereupon at once pay the said sum of $10,000 and interest thereon, as aforesaid, into this court.

4. It is further ordered that the said assets of the said estate shall remain under the control of this court until the final settlement of

the said estate, and that any other or further assets of said estate that may be discovered shall be paid over to this court.

A. B. HAGNER,
Asso. Justice.

We consent to the above.

HANNA & JOHNSTON,
Counsel for Charles McIntire, Jr.
NEWTON & BERRYMAN,
Counsel for Martha McIntire, Adeline McIntire, Emma T. McIntire, E. A. McIntire, Elizabeth M. Test.
M. W. BRAINARD,
Counsel for A. L. Galliher et al.

Endorsed: In orphans' court. No. 1532. D 11. *In re* estate of David McIntire. Order to pay money & securities into court, &c. I consent. Brainard. Filed Feb. 19, 1885. Office register of wills. H. J. Ramsdell, register, D. C.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business

In re Estate of DAVID MCINTIRE, Deceased.

Whereas, by an order passed herein on the 19th day of February, 1885, it was ordered that the controversy between Edwin A. McIntire, the administrator herein, and Charles McIntire, Jr., and others, next of kin of said David McIntire, deceased, as to the receipt
11 by Edwin A. McIntire of the sum of ten thousand dollars ($10,000) and his accountability of the same, as claimed by certain of the said next of kin to be due by him to said estate, be submitted to the decision of Campbell G. Berryman, James M. Johnston, and James G. Payne or any two of them, and that said arbitrators should proceed forthwith to hear all the proofs and allegations which the said parties might adduce of and concerning the said controversy, and that the decision which they or any two of them might make in writing in the premises under their hands should be returned into this court, as will appear by reference to said order;

And whereas the said Edwin A. McIntire, the said administrator, has transmitted to the arbitrators who sign this award his request and agreement that these arbitrators should return an award against him for the sum of ten thousand dollars involved in the order of reference hereinbefore referred to and declared that he had no desire to produce any proofs before these arbitrators, as will appear by a correct copy of said written request and agreement, herewith filed and made part hereof;

(Attached hereto are the original receipts referred to in the said Edwin A. McIntire's said request and agreement):

Now, therefore, the said Campbell G. Berryman and James M. Johnston, two of said arbitrators, make return to the court here of heir award in the premises to the following effect:

1. They find and award that Edwin A. McIntire did receive, on April 18th, 1884, as administrator of David McIntire, deceased, the said sum of ten thousand dollars ($10,000), in addition to the stocks, bonds, and other assets of said estate paid into court by said Edwin A. McIntire.

2. That said Edwin A. McIntire ought to account, as administrator of said David McIntire, for the said sum of ten thousand dollars, in accordance with the order passed in this cause on February, 19, 1885.

Whereupon the said Campbell G. Berryman and James M. Johnston file herewith admission of the service of a copy of the above award upon the attorneys for the respective parties in interest.

Witness our hands and seals this 31st day of March, 1885.

CAMPBELL G. BERRYMAN. [SEAL.]
JAMES M. JOHNSTON. [SEAL.]

Service of a copy of the above award is hereby admitted to have been made upon us this 4th day of April, 1885.

JOHN F. HANNA,
Counsel for Chas. McIntire, Jr.
M. D. BRAINARD,
Counsel for A. L. Galliher et al.
W. J. NEWTON,
Att'y for Edwin A. McIntire, Emma T. McIntire, Martha McIntire, Adaline McIntire, Elizabeth McIntire Test.

12 In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Estate of DAVID MCINTIRE, Deceased.

Messrs. Campbell G. Berryman and James M. Johnston, arbitrators:

I request and agree that you return an award against me for the sum of ten thousand dollars involved in the order of reference to you as arbitrators of the 19th Febr., 1885, passed in the above-entitled cause. I file herewith receipts of Martha McIntire, Elizabeth McIntire Test, Adaline McIntire, and Emma T. McIntire, distributees of the estate of David McIntire, deceased, each for the sum of twenty-five hundred dollars, showing the amount of ten thousand dollars already paid on account of amount respectively due them. I have no desire to produce proofs before you, the said Berryman and Johnston, and will not contest any matters with my relatives.

Respectfully, E. A. McINTIRE.

8960

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Estate of DAVID McINTIRE, Deceased.

Messrs. Campbell G. Berryman and James M. Johnston, arbitrators:

I am willing that in finding your award against me in the above-entitled cause for the sum of $10,000 that you shall assume that the said sum was paid to me on the 18th day of April, 1884.

E. A. McINTIRE.

Received at Washington, D. C., Febr. 25, '85, of Edwin A. McIntire, administrator, the sum of twenty-five hundred dollars on ac. of my share in the estate of David McIntire.

EMMA T. McINTIRE.

Received at Washington, D. C., Feb. 25, '85, of Edwin A. McIntire, administrator, the sum of twenty-five hundred dollars on account of my share in the estate of David McIntire.

MARTHA McINTIRE.

Received at Washington, D. C., Feb. 25, '85, of Edwin A. McIntire, administrator, the sum of twenty-five hundred dollars on ac. of my share in the estate of David -Intire.

ADALINE McINTIRE.

Received at Washington, D. C., Feb. 25th, '85, of Edwin A. McIntire, administrator, the sum of twenty-five hundred dollars on ac. of my share in the estate of David McIntire.

ELIZABETH M. TEST.

Endorsed: No. 1532. D 11. *In re* estate of David McIntire, dec'd. Award of arbitrators, Campbell G. Berryman & James M. Johnston, pursuant to order passed herein Febr'y 19th, 1885. Service of copy acknowledge-. Newton. Filed April 7, 1885. H. J. Ramsdell, register of wills, D. C. Office register of wills.

13 In the Supreme Court of the District of Columbia, Orphans' Court Jurisdiction.

In re Estate of DAVID McINTIRE, Deceased.

On consideration of the award of James M. Johnston and Campbell G. Berryman, filed herein on the seventh day of April, 1885, and the counsel for the several parties consenting, it is hereby or-

dered this 25th day of April, 1885, that the said award be finally ratified and confirmed.

A. B. HAGNER.

JNO. F. HANNA,
Att'y for Charles McIntire, Jr.
W. J. NEWTON,
For E. A. McIntire, Adaline McIntire,
Martha McIntire, Elizabeth McIntire Test, Emma McIntire.
JAMES K. REDDINGTON,
Att'y for A. Laura Galliher, Wm. E. McIntire,
Emma V. McIntire, H. Norman McIntire.
W. J. NEWTON.
REDINGTON & BRAINARD.

Endorsed: No. 1532. D 11. In the orphans' court of the D. C. *In re* estate of David McIntire, dec'd. Order ratifying the award of the arbitrators. Filed Apr. 25, 1885. Office of register of wills. H. J. Ramsdell, register, D. C.

Petition. Filed March 5, 1886.

In the Supreme Court of the District of Columbia, Holding a Special Term, Probate Jurisdiction.

In re the Estate of DAVID MCINTIRE, Dec'd.

To the hon. the judges:

The petition of Sarah McIntire, Martha McIntire, Elizabeth McIntire Test, Edwin A. McIntire, and Emma T. McIntire respectfully represents:

That David McIntire departed this life on April 1st, 1884, leaving a will, which was proven on the 8th day of April, 1884, duly admitted to probate and record on the 12th day of April, 1884, and recorded in Will Book No. 21 page 234, &c., by which said will he devised to his nieces and nephew, children of his brother Edwin T. McIntire, certain special legacies, with remainder to be divided between said nieces and nephew and a certain nephew, the son of his brother Charles McIntire.

That the said Martha McIntire, Elizabeth McIntire Test, and Emma T. McIntire are the nieces and the said Edwin A. McIntire the nephew alluded to as the children of the late Edwin T. McIntire, and that the said Sarah McIntire is the widow of the said Edwin T. McIntire, the mother of said special legatees and the assignee of the late Adaline McIntire, who was also one of said nieces and who departed this life on the 21st day of July, A. D. 1885.

14 That on the 5th day of June, 1885, the said Charles McIntire, a brother of the deceased, filed a petition in this court with a view to revoke the probate of said will, and if said will is set aside your petitioners would then, instead of receiving the bulk of the estate, be entitled to only one-half thereof.

That on the suggestion of the administrator and by order of court passed February 19th, 1885, the funds belonging to said estate were deposited in the vaults of the Washington Safe Deposit Co. in box number 874, the keys of which box are now and have been since February 19th, 1885, in the custody of the register of wills, and that by an account filed by the administrator c. t. a. at the expiration of *his year, to wit, on the 15 day of May, 1885, it was shown that the* estate consisted entirely of personal property, and that there was ready for distribution the sum of $57,161.91.

That, believing the wishes of the deceased have been fully expressed by him in his own writing and in his own language, that the will probated was *his* will, that he was fully competent to make such disposition of his own property, that the estate was judiciously administered, and the accounts properly stated, your petitioners have felt called upon to oppose to the fullest extent of the law any action looking to the cancellation of so solemn an undertaking. They have to that end retained as counsel Gen'l S. S. Henkle, who for some months past has been managing their interests.

Your petitioners, however, feel that some remuneration should at this time be made to said counsel for his services, and they therefore pray that an allowance from said funds of the sum of five hundred dollars ($500) be ordered by this court on account thereof, and that the register of wills be directed to allow the administrator to withdraw that amount from the Washington Safe Deposit Co., and that such further or other proceedings in the premises should be had as may be legal and proper.

SARAH McINTIRE.
MARTHA McINTIRE.
ELIZABETH M. TEST.
EDWIN A. McINTIRE.
EMMA T. McINTIRE.

It is, this 5th day of March, 1886, ordered that the register of wills pay to S. S. Henkle five hundred dollars out of the funds in his custody belonging to the estate of David McIntire, dec'd, to be charged to the distributive shares of the petitioners, Sarah McIntire, Martha McIntire, Elizabeth M. Test, Edwin A. McIntire, and Emma T. McIntire.

W. S. COX, *J.*

$500.

Received at Washington, D. C., March 6, 1886, from H. J. Ramsdell, register of wills, five hundred dollars out of the estate of David McIntire, deceased, under the above order of court, passed March 5, 1886.

S. S. HENKLE.

15 Money, 25 $20 notes, brought from Washington Safe Deposit Co. by H. J. Ramsdell, register of wills, and delivered to Gen'l S. S. Henkle by M. J. Griffith.

Endorsed: No. 1532. D 11. *In re* estate of David McIntire, deceased. Petition of Sarah McIntire and others, praying the court to allow S. S. Henkle, Esq., att'y, $500 out of funds in the custody of the court belonging to said estate and order of court directing the register of wills to pay the same. Filed Mar. 5, 1886. Office register of wills. H. J. Ramsdell, register, D. C.

Order. Filed August 13, 1886.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of DAVID McINTIRE, Dec'd.

Upon motion of Edwin A. McIntire, administrator c. t. a. herein, by S. S. Henkle, his solicitor, and all parties in interest in said estate, either as legatees under the alleged will or as next of kin of said David McIntire, by their counsel, consenting thereto, and it appearing to the court from the proceedings herein that all the debts due by said decedent have been paid except a note for $5,000, claimed to be due to said administrator, but which claim is not admitted by all of said parties in interest, it is by the court this thirteenth day of August, A. D. 1886, ordered that the register of wills do deliver to the solicitors for the said prrties in interest in said estate all the moneys, stocks, bonds, and other assets belonging to said estate in his possession or under his control and which were committed to his custody under the order herein of February nineteenth, A. D. 1885, the said moneys, stocks, bonds, and other assets to be held by said solicitors, subject to the further order of the court herein, until the final settlement of the litigation touching the said estate.

WM. M. MERRICK, *A. J.*

We consent to the foregoing order.

EDWIN A. McINTIRE,
Adm'r c. t. a.

S. S. HENKLE,
Sol. for E. A. McIntire, Martha McIntire, Emma T. McIntire, Sarah McIntire, & Elizabeth Test.

WM. G. JOHNSON,
Solicitor for Charles McIntire, Sr., and Charles McIntire, Jr.

Endorsed: No. 1532. D 11. *In re* estate of David McIntire, dec'd. Ordering directing register of wills to deliver assets of estate to solicitors of parties. Filed August 13, 1886. Office register of wills. H. J. Ramsdell, register, D. C.

16 *Order. Filed February* 9, 1891.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of DAVID MCINTIRE, Deceased.

Upon consideration of the verdict of the jury rendered upon the issues heretofore sent to be tried, involving the validity of the paper-writing purporting to be the last will of David McIntire, deceased, certified to this court from the special term, sitting as a circuit court, and filed on the 15th day of January, 1891, and of the objections thereto filed by the caveator on the 6th day of February, 1891, it is ordered, adjudged, and decreed by the court this 9th day of February, 1891, that the said objections be, and they are hereby, overruled; that the motion of the caveator for a new trial of said issues is hereby denied; that the said paper-writing be, and the same is hereby, admitted to probate as the last will and testament of David McIntire, deceased, and that the costs of this proceeding be taxed against the estate of the caveator and be paid by his administrator.

A. C. BRADLEY, *Justice.*

Endorsed: No. 1532. D 11. *In re* estate of David McIntire, deceased. Order admitting the contested paper-writing to probate as the last will and testament of said David McIntire, deceased. Filed Feb. 9, 1891. L. P. Wright, register of wills, District of Columbia.

Order. Filed December 2, 1892.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of DAVID MCINTIRE, Deceased.

Upon consideration of the petition of James M. Johnston and the consent hereto of the caveator and caveatees, by their counsel, it is by the court, this 2d day of December, A. D. 1892, ordered that the said James M. Johnston be, and he is hereby, relieved from the further custody of the said estate.

And it is further ordered that Calderon Carlisle be, and he is hereby, substituted in the place and stead of said James M. Johnston as custodian of said estate, to hold the same with the said S. S. Henkle, upon the same terms and conditions as the said estate is now held by the said Henkle and Johnston, until the final determination of the litigation involving the right to the said estate.

A. C. BRADLEY, *Justice.*

I consent to the foregoing entry.
S. S. HENKLE,
Counsel for Caveatees.
Dec. 2, '92.

I consent to the above order.
WM. G. JOHNSON,
Counsel for Caveator.

17 Endorsed: No. 1532. D 11. *In re* estate of David McIntire, deceased. Consent order substituting Calderon Carlisle as one of the custodians of the fund in place of James M. Johnston, relieved at his own request. Filed Dec. 2, 1892. L. P. Wright, register of wills, D. C.

Petition. Filed July 18, 1893.

In the Supreme Court of the District of Columbia, Sitting for Orphans' Court Business.

In re Estate of DAVID MCINTIRE, Dec'd.

Your petitioner, S. S. Henkle, respectfully prays the court to allow him five thousand dollars on account of fees for services in defending the will of the testator, David McIntire, to be paid out of the money now in the Bank of Washington to the credit of S. S. Henkle and Calderon Carlisle, as custodians of the assets of said estate.

S. S. HENKLE.

DISTRICT OF COLUMBIA, *ss:*

The petitioner, S. S. Henkle, being duly sworn, says he is justly entitled to the allowance for which he asks in the foregoing petition, as he verily believes.

——— ———.

Sworn to and subscribed before me this 17 day of July, 1893.
[SEAL.] L. P. WRIGHT,
Register Wills.

Endorsed: No. 1532. D 11. *In re* estate of David McIntire. Petition of S. S. Henkle for allowance of att'y's fees. Filed July 18th, 1893. L. P. Wright, register of wills, District of Columbia.

Order. Filed July 22, 1893.

In re Estate of DAVID MCINTIRE, Dec'd.

The petition of S. S. Henkle, counsel for the caveatees, for an allowance of five thousand dollars on account of counsel fees in defending the will of the testator, to be paid out of the money now in the custody of said S. S. Henkle and Calderon Carlisle and on deposit in the Bank of Washington, came on to be heard, and was argued by counsel; on consideration whereof, it is this 22d day of July, 1893, ordered that the prayer of said petition be granted, and the said S. S. Henkle and Calderon Carlisle are hereby ordered to forthwith pay to the said S. S. Henkle, out of the money to their credit in the Bank of Washington, the said sum of five thousand dollars; and it is further ordered that the order of this court passed on the 18th day of July, 1893, directing and requiring the said

Henkle and Carlisle to invest seventeen thousand five hun-
18 dred dollars of the cash in first-mortgage real-estate securities, &c., be so modified as to direct and require the said Henkle and Carlisle to invest in first-mortgage real-estate securities whatever balance may remain in their hands after the payment of the said sum of five thousand dollars to the said S. S. Henkle, as required by this order.

A. B. HAGNER,
Asso. Justice.

Endorsed: Orphans' court. No. 1532. D 11. *In re* estate of David McIntire, dec'd. Order to pay S. S. Henkle $5,000 out of the money in the hands of S. S. Henkle & Calderon Carlisle. Filed July 22, 1893. L. P. Wright, register of wills, District of Columbia.

Amended Order. Filed July 31, 1893.

In the Supreme Court of the District of Columbia, Sitting as an Orphans' Court.

In re Estate of DAVID MCINTIRE. No. 1532.

On motion of S. S. Henkle, on his own behalf and representing the legatees, Edwin A. McIntire, Sarah McIntire, Elizabeth McIntire Test, Martha McIntire, and Emma T. McIntire, it is this 31st day of July, 1893, ordered that the order passed by this court on the 22nd day of July, 1893, requiring S. S. Henkle and Calderon Carlisle to forthwith pay to said Henkle, out of the money to their credit in the Bank of Washington as custodians of the assets of the estate of David McIntire, the sum of five thousand dollars on account of counsel fees for defending the will of the said David McIntire be amended by adding thereto "that the said sum of five thousand dollars shall be charged against the interest of the said Edwin A. McIntire, Sarah McIntire, Elizabeth McIntire Test, Martha McIntire, and Emma T. McIntire, in said estate, without prejudice, however, to the right of said named legatees or of the administrator c. t. a. to apply to this court, at the termination of the litigation touching the validity of the will of the said David McIntire, to have said allowance charged against the estate of the said testator.

A. B. HAGNER.

I consent to the foregoing order.

WM. G. JOHNSON,
Counsel for Charles McIntire, Jr., & Charles McIntire, Jr., Administrator of Charles McIntire, Deceased.

Endorsed: No. 1532. D 11. *In re* estate of David McIntire. Amended order allowing S. S. Henkle counsel fees. Filed Jul- 31, 1893. L. P. Wright, register of wills, District of Columbia.

19 *Order. Filed July* 3, 1895.

In the Supreme Court of the District of Columbia, Holding Orphans' Court.

In re Estate of DAVID MCINTIRE, Deceased. No. 1532.

On motion of the caveatees, by Enoch Totten, Esquire, their proctor, and it appearing to the court that Saul S. Henkle, Esquire, formerly proctor for said caveatees, departed this life on or about May 21, 1895, it is adjudged and ordered, this 3d day of July, A. D. 1895, that said Enoch Totten be, and he is hereby, substituted in the place and stead of said Saul S. Henkle, as custodian, jointly with Calderon Carlisle, Esquire, of the funds and assets of the estate of said David McIntire, deceased, in pursuance of the former orders of this court passed on this subject, including those dated respectively February 19, 1885, August 13, 1886, and December 2, 1892, the said Enoch Totten and Calderon Carlisle to hold the said funds and assets upon the same terms and conditions as formerly held by said Saul S. Henkle and Calderon Carlisle, until the final settlement of the litigation involving the right to said estate.

E. F. BINGHAM, *C. J.*

We consent.

J. M. WILSON,
CALDERON CARLISLE,
WM. G. JOHNSON,
L.,
Proctors for Caveator.

Endorsed: No. 1532. D. 11. McIntire, David, estate of. Order substituting Enoch Totten for S. S. Henkle as one of the custodians of the assets. Filed Jul- 3, 1895. L. P. Wright, register of wills.

Petition. Filed July 12, 1895.

In the Supreme Court of the District of Columbia, Holding Orphans' Court.

In re Estate of DAVID MCINTIRE, Deceased. No. 1532.

Petition.

This petition of Sarah McIntire, Martha McIntire, Elizabeth McIntire Test, Edwin A. McIntire, and Emma T. McIntire, referring to the former proceedings in this cause, particularly their petition and order thereon filed March 5, 1886, for the payment of counsel fees, now respectfully states:

1. That their former counsel and proctor in defending the last will and testament of said David McIntire, deceased, namely, Saul

S. Henkle, Esquire, departed this life on or about May 21,
20 1895, the case being still unsettled and now pending on appeal to the Supreme Court of the United States, as petitioners are advised.

2. That petitioners have now engaged as their counsel and proctor Enoch Totten, Esquire, and desire that a payment of five hundred dollars be made to him on account of his services rendered and to be rendered in this cause, out of the funds and assets of the estate now under the control of this honorable court, and in which petitioners will have a large interest, whether said last will and testament be finally sustained or set aside. Petitioners hereby refer to the order passed herein for a similar purpose on July 22, 1893, as amended July 31, 1893.

The premises considered, petitioners pray:

1. That an order may be passed authorizing and directing the custodians — the funds and assets of said estate to pay to Enoch Totten, Esquire, the sum of five hundred dollars, on account of professional services rendered and to be rendered by him, as aforesaid, said payment to be charged against the interest and shares of these petitioners in said estate, but without prejudice to the right of these petitioners to apply to the court, at the close of the pending litigation, to have said payment charged against the estate.

2. That petitioners may have such other and further relief as the case may require.

SARAH McINTIRE.
MARTHA McINTIRE.
EMMA T. McINTIRE,
E. A. McINTIRE,
Ag't for Mrs. Eliz. Test.
E. A. McINTIRE.

Order. *Filed July* 12, 1895.

In the Supreme Court of the District of Columbia, Holding an Orphans' Court.

In re Estate of DAVID MCINTIRE, Deceased. No. 1532.

Order.

Upon consideration of the petition of Sarah McIntire, Martha McIntire, Elizabeth McIntire Test, Edwin A. McIntire, and Emma T. McIntire, filed the twelfth day of July, A. D. 1895, it is adjudged and ordered, this 12th day of July, A. D. 1895, that Calderon Carlisle and Enoch Totten, custodians of the funds and assets belonging to the estate of David McIntire, deceased, be, and they are hereby, authorized and directed, out of said funds in their hands, to pay to said Enoch Totten, proctor for said petitioners, the sum of five hundred dollars ($500) on account of his professional services in defending the paper heretofore admitted to probat- and record as the will of said deceased, the said payment of five hundred dollars to be

charged against the interest and shares of said Sarah McIntire, Martha McIntire, Elizabeth McIntire Test, Edwin A. McIntire, and Emma T. McIntire in, to, or out of the funds and assets of said estate, without prejudice, however, to the right of said parties, petitioners, or of the administrator c. t. a. of the estate, to apply to the court at the close of the litigation touching the validity of the will of said David McIntire to have said payment and allowance charged against the estate of said deceased.

21

CHAS. C. COLE,
Asso. Justice.

We consent to the above order.
July 11, 1895.
CALDERON CARLISLE,
WM. G. JOHNSTON,
Counsel for Caveator.

Endorsed: No. 1532. D 11. Adm'n doc. McIntire, David, estate of. (1.) Petition of Sarah McIntire *et al.* for payment of $500 to their proctor. (2.) Order granting same. Enoch Totten, proctor for petitioners. Filed Jul- 12, 1895. L. P. Wright, register of wills.

Petition. Filed January 28, 1896.

In the Supreme Court of the District of Columbia, Holding Orphans' Court.

In re Estate of DAVID MCINTIRE, Deceased. No. 1532.

Petition.

This petition of Sarah McIntire, Martha McIntire, Elizabeth McIntire Test, Edwin A. McIntire, and Emma T. McIntire, referring to the former proceedings in this cause, particularly their petition and order thereon, filed July 12, 1895, for the payment of counsel fees, now respectfully states:

1. That since said petition and order Enoch Totten, Esquire, has performed further work and services as counsel to defend the paper admitted to probate as the last will and testament of David McIntire, deceased, and these petitioners desire that a further payment of one thousand dollars be made to him on account of his services rendered and to be rendered in this cause out of the funds and assets of the estate now under the control of this honorable court, and in which petitioners will have a large interest whether said last will and testament be finally sustained or set aside.

Petitioners hereby refer to the order passed herein for a similar purpose July 12, 1895.

The premises considered, petitioners pray:

1. That an order may be passed authorizing and directing the custodians of the funds and assets of said estate to pay to Enoch Totten, Esquire, the sum of one thousand dollars ($1,000) on account of professional services rendered and to be rendered by him, as

aforesaid, said payment to be charged against the interest and shares of these petitioners in said estate, but without prejudice to the right of these petitioners to apply to the court at the close of the
22 pending litigation to have said payment charged against the estate.

2. That petitioners may have such other and further relief as the case may require.

SARAH McINTIRE.
MARTHA McINTIRE.
EMMA T. McINTIRE.
EDWIN A. McINTIRE,
Agent for Elizabeth McIntire Test.
EDWIN A. McINTIRE.

Order. Filed January 28, 1896.

In the Supreme Court of the District of Columbia, Holding an Orphans' Court.

In re Estate of DAVID McINTIRE, Deceased. No. 1532.

Order.

Upon consideration of the petition of Sarah McIntire, Martha McIntire, Elizabeth McIntire Test, Edwin A. McIntire, and Emma T. McIntire, filed the 28th day of January, A. D. 1896, it is adjudged and ordered, this 28th day of January, A. D. 1896, that Calderon Carlisle and Enoch Totten, custodians of the funds and assets belonging to the estate of David McIntire, deceased, be, and they are hereby, authorized and directed, out of said funds in their hands, to pay to said Enoch Totten, proctor for said petitioners, the sum of one thousand dollars ($1,000) on account of his professional services in defending the paper heretofore admitted to probat- and record as the will of said deceased, the said payment of one thousand dollars to be charged against the interest and shares of said Sarah McIntire, Martha McIntire, Elizabeth McIntire Test, Edwin A. McIntire, and Emma T. McIntire in, to, or out of the funds and assets of said estate, without prejudice, however, to the right of said parties, petitioners, or of the administrators c. t. a. of the estate, to apply to the court at the close of the litigation touching the validity of the will of said David McIntire to have said payment and allowance charged against the estate of said deceased.

A. B. HAGNER.

We consent to the above order.
CALDERON CARLISLE,
Of Counsel for Caveator, Charles McIntire, Jr., Adm'r of Charles McIntire, Dec'd.

Endorsed: No. 1532. D 11. McIntire, David, estate of. Petition of Sarah McIntire *et al.* for payment of counsel fee to Enoch Totten and order of court allowing same. Filed Jan. 28, 1896. J. Nota McGill, register of wills.

23 *Mandate. Filed May* 15, 1896.

Filed May 15, 1896. John R. Young, clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the hon-
justices
[SEAL.] orable the [judges]* of the supreme court of the [United States for the]* District of Columbia, Greeting:

Whereas lately, in the supreme court of the [United States for the]* District of Columbia, before you or some of you, in a cause between Charles McIntire, Jr., administrator of Charles McIntire, deceased, plaintiff, and Edwin A. McIntire, Martha McIntire, Emma T. McIntire, Elizabeth McIntire Test, and Sarah McIntire, assignee of Adaline McIntire, defendants, wherein the judgment of the said supreme court entered in said cause on the 16th day of July, A. D. 1892, is in the following words, viz:

"This cause having been submitted to the court by the caveator upon the appeal from the order passed at the special term for orphans' court business Feb'y 9, 1891, and the caveatees having moved to dismiss said appeal, it is, by the court in general term, this 16th day of July, 1892, upon consideration thereof, ordered that said appeal be, and the same is hereby, dismissed.

By the court:

A. B. HAGNER,
Asso. Justice."

as by the inspection of the transcript of the record of the said supreme court, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and ninety-five, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs and that the said defendants, Edwin A. McIntire *et al.*, recover against the said plaintiff for their costs herein expended and have execution therefor.

April 13, 1896.

You therefore are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the

---

* [* Words enclosed in brackets erased in copy.]

United States, the 13th day of May, in the year of our Lord one thousand eight hundred and ninety-six.

24 *Costs of Defendants.*

Clerk..... $
Printing record.....
Attorney.....

$

Paid by pl'ff.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Endorsed: 1532. Orphans' ct. D 11. Supreme Court of the United States. No. 142, October term, 1895. Charles McIntire, Jr., administrator, &c., *vs.* Edwin A. McIntire *et al.* Mandate. 8 M. Ct. T., p. 214. Filed May 15, 1896. J. Nota McGill, register of wills. Filed May 15, 1896. J. R. Young, clerk.

Petition. Filed June 1, 1896.

In the Supreme Court of the District of Columbia, Holding an Orphans' Court.

In re Estate of DAVID MCINTIRE, Deceased. No. 1532.

Petition.

This petition of Sarah McIntire, Martha McIntire, Elizabeth McIntire Test, Edwin A. McIntire, and Emma T. McIntire, referring to the former proceedings in this cause, particularly their petition and order thereon, filed March 5, 1886, for the payment of counsel fees, now respectfully states:

1. That on the 13th day of April, 1896, the Supreme Court of the United States announced its decision upon the appeal in the case of McIntire *v.* McIntire (No. 142, October term, 1895), and the mandate of said court has been received and duly filed in this court in the above-entitled case.

2. That petitioners now desire to pay to their counsel and proctor, Enoch Totten, Esquire, for his professional services in this litigation the further sum of five thousand dollars out of their shares and interest in the funds held by and under the control of this court, reserving the right to apply to the court to have said payment and other similar payments heretofore made by them allowed as a charge against the estate of said David McIntire, deceased, as having been incurred in defending the validity of his last will and testament.

Petitioners therefore pray that an order may be passed authorizing and directing the custodians of the funds and assets of said estate to pay to said Enoch Totten the sum of five thousand dollars

for his professional services, as aforesaid, said payment to be charged against the interest and shares of these petitioners in said estate, but without prejudice to their right to apply to the court to have said payment charged against the estate, and that petitioners may have such other and further relief as the case may require.

SARAH McINTIRE.
ELIZABETH McINTIRE TEST,
By her att'y, E. A. McINTIRE.
MARTHA McINTIRE.
EDWIN A. McINTIRE.
EMMA T. McINTIRE.

Endorsed: No. 1532. D 11. Estate of David McIntire, deceased. Petition of Sarah McIntire & others for further payment to counsel. Filed Jun- 1, 1896. J. Nota McGill, register of wills.

Order. Filed June 1, 1896.

In the Supreme Court of the District of Columbia, Holding Orphans' Court.

In re Estate of DAVID McINTIRE, Deceased. No. 1532.

Order.

Upon consideration of the petition of Sarah McIntire, Martha McIntire, Elizabeth McIntire Test, Edwin A. McIntire, and Emma T. McIntire, filed the first day of June, A. D. 1896, it is adjudged and ordered, this first day of June, A. D. 1896, that Calderon Carlisle and Enoch Totten, custodians of the funds and assets belonging to the estate of David McIntire, deceased, be, and they are hereby, authorized and directed, out of said funds in their hands, to pay to said Enoch Totten, proctor for said petitioners, the sum of five thousand dollars ($5,000) on account of his professional services in defending the paper heretofore admitted to probat- and record as the will of said deceased, the said payment of five thousand dollars to be charged against the interest and shares of said Sarah McIntire, Martha McIntire, Elizabeth McIntire Test, Edwin A. McIntire, and Emma T. McIntire in, to, or out of the funds and assets of said estate, without prejudice, however, to the right of said petitioners, or of the administrators c. t. a of the estate, to apply to the court to have said payment and allowance charged against the estate of said deceased.

A. B. HAGNER.

We consent to the passing of this order.
CARLISLE & JOHNSON,
For Charles McIntire, Jr., Administrator of Charles McIntire, Deceased.

Endorsed: No. 1532. D 11. Estate of David McIntire, deceased. Order authorizing custodians of assets to pay a counsel fee to Enoch Totten, Esq. Filed Jun- 1, 1896. J. Nota McGill, register of wills.

26 *Report. Filed June 26, 1896.*

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of DAVID MCINTIRE. No. 1532. Adm'n Doc.

Report of Enoch Totten and Calderon Carlisle, custodians of the estate of David McIntire, successors to Saul S. Henkle and James M. Johnston, former custodians.

Receipts.

1886.		
Aug. 17.	Cash and securities turned over this day by register of wills to Messrs. Saul S. Henkle and James M. Johnston under order of court passed August 13, 1886, to wit:	
	Cash	$9,589.40
	Certificate of receiver of German-American national bank for $500, no value	0.00
	1 certificate, No. 01151, for forty-two shares Northern Pacific railroad stock of $100 each.	1,680.00
	1 U. S. 4% consol, 190,119, for $100	122.00
	4 U. S. 4% consols for $500 each, 72489, 72490, 72491, and 72492, $2,000	2,440.00
	NOTE.—Last coupons attached to said five bonds bear date April 1, 1885.	
	1 certificate, No. 7829, fractional dividend scrip Northern Pacific railroad	466.20
	2 coupons, No. 916, for $30 each, Chesapeake and Ohio Coal and Lumber Co., $60; no value	0.00
	23 certificates of the Pennsylvania railroad for seven hundred and thirty-four shares of stock, par value, $50 per share, $36,700.00	37,434.00
	Amount forward	$51,731.60
1888.	Amount forward	51,731.60
Mar. 14.	Cash from Edwin A. McIntire, administrator, on account of dividends received from Pennsylvania railroad, as per account of said administrator rendered June 29, 1888	1,452.99
	Certificate for fifty-nine shares of stock of Pennsylvania railroad received from ditto, as per same account	2,950.00
		$56,134.59

27 Cash from Pennsylvania railroad dividends as follows:

Nov., 1889, 2½ % on 793 shares	991.25
May, 1890, 3 % " 841 "	1,261.50
Nov., 1890, 2½ % " " "	1,051.25
May, 1891, 3 % " " "	1,261.50
Nov., 1891, " " " "	1,261.50
May, 1892, " " " "	1,261.50
Nov., 1892, " " " "	1,261.50
May, 1893, 2½ % " " "	1,051.25
Scrip dividend, representing an extra dividend, redeemable in cash	841.00
Nov., 1893, 2½ % on 841 shares	1,051.25
May, 1894, " " " "	1,051.25
Nov., 1894, " " " "	1,051.25
May, 1895, " " " "	1,051.25
Nov., 1895, " " " "	1,051.25
May, 1896, " " " "	1,051.25
Note of Charles C. Duncanson, dated Aug. 22, 1893, secured by first deed of trust, being investment made as per order of court	5,000.00

NOTE.—The interest on above investment is paid to February 22, 1896.

Amount forward	$77,684.34
Amount forward	77,684.34
Interest on loan of $10,000 to J. D. Kitch from July 1, 1893, to Sep. 24, 1895	1,308.34
Principal of said loan paid Sep. 25, 1895	10,000.00
Interest on loan of $5,000 to C. C. Duncanson from Aug. 22, 1893, to Feb. 22, 1896	750.00
	$89,742.68

Disbursements.

1893.		
July 31.	By paid S. S. Henkle counsel fees, as per order of court, voucher 1	$5,000.00
July 31.	By loan to J. D. Kitch per order of court, voucher 2	10,000.00
Aug. 24.	Loan to C. C. Duncanson per order of court, voucher 3	5,000.00
Dec. 15.	By paid James G. Payne, auditor, voucher 4	25.00
1894.		
Oct. 15.	By paid Sam. Cross, secretary, rent of box in Washington Safe Deposit Co., voucher 5	20.00
	By paid Enoch Totten counsel fees, per order of court, as follows, voucher 6	500.00

28	By paid Enoch Totten counsel fees, per order of court, voucher 7.....	1,000.00	
	By paid Enoch Totten counsel fees, per order of court, voucher 8.....	5,000.00	
1895.			
June 24.	By paid Sam. Cross, secretary Washington Safe Deposit Company, rent of box, voucher 9.....	10.00	
	Balance carried forward.....	63,187.68	
		$89,742.68	$89,742.68
	Balance brought forward.....	$63,187.68	

Consisting of the following:

Cash in bank.....	.....	$12,254.48
Scrip dividend, Pennsylvania railroad.....	.....	841.00
Note of C. C. Duncanson for $5,000, dated Aug. 22, 1893; interest paid to Feb. 22, 1896.	.....	5,000.00
Certificate of receiver German-American national bank for $500, no value.....	.....	0.00
1 certificate, No. 01151, for forty-two shares Northern Pacific railroad stock of $100 each	.....	1,680.00
1 U. S. 4 % consol, 190,119, for $100	.....	122.00
4 U. S. 4 % consols for $500 each—72489, 72490, 72491, & 72492—$2,000.....	.....	2,440.00
NOTE.—The last coupons attached to the five foregoing bonds bear date April 1, 1885.		
1 certificate, No. 7289, fractional dividend script, Northern Pacific railroad	.....	466.20
2 coupons, No. 916, for $30 each, Chesapeake and Ohio Coal and Lumber Company, no value	.....	0.00
23 certificates Pennsylvania railroad for seven hundred and thirty-four shares of stock, par value, $50 per share, $36,700.....	.....	37,434.00
1 certificate of ditto for fifty-nine shares of stock for $50 each.....	.....	2,950.00
	$63,187.68	$63,187.68

Note 1. Calderon Carlisle was appointed custodian in place of James M. Johnston by order of court passed December 2, 1892, and Enoch Totten succeeded Saul S. Henkle as custodian by order passed July 3d, 1895.

Note 2. By additional account of E. A. McIntire filed herein he appears to have forty-eight new shares of stock of Pennsylvania Railroad Company and a balance of $1,419.73 in cash. Neither this stock nor said cash balance was ever turned over to any of the custodians.

29 Note 3. Ten thousand dollars in cash belonging to the estate of said David McIntire was paid by E. A. McIntire to himself and his three sisters in equal shares, for which their respective receipts are on file in this cause; said sum of ten thousand dollars, however, never came into the possession of these custodians or that of their predecessors.

Note 4. It was impossible to collect the sum of $431.42 ordered by the court to be paid by H. J. Ramsdell, then register of wills, to Messrs. Henkle and Johnston, per order passed October 22, 1888 (the said sum of $431.42 being the difference between the proper allowance to the said register of wills and the amount actually withheld by him from the assets of the estate when he delivered the same to said custodians); the said register was then insolvent, as was his estate after his death.

Note 5. These custodians claim a commission of — per centum on the amounts of cash and securities passing through their hands.

Respectfully submitted.

ENOCH TOTTEN.
CALDERON CARLISLE.

DISTRICT OF COLUMBIA, ss:

We do solemnly swear that we have read the annexed and aforegoing account by us subscribed and know the contents thereof; that the same is in all particulars correct and true, and that we have *bona fide* paid the several sums of money to the several parties therein mentioned, for which we claim credit and allowance.

ENOCH TOTTEN.
CALDERON CARLISLE.

Subscribed and sworn to before me this twenty-sixth day of June, A. D. 1896.

[SEAL.] OSCAR LUCKETT,
Notary Public, D. C.

Endorsed: No. 1532. D 11. Administration docket. In the matter of the estate of David McIntire, deceased. Report of Enoch Totten and Calderon Carlisle, custodians. Recorded, Accounts # 35, J. N. McG., folio 194. Filed June 26, 1896. J. Nota McGill, register of wills.

Order. Filed July 7, 1896.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of DAVID McINTYRE, Dec'd.

Upon consideration of the account of the assets of the said estate, committed on the 13th day of August, 1886, to the custody and management of the solicitors for the respective parties in interest, to hold and manage under the orders of the court, and of the accom-

panying report of Messrs. Enoch Totten and Calderon Carlisle
30 as to such management, it is by the court, this seventh day of July, A. D. 1896, after hearing counsel for the parties in interest, ordered that there is hereby allowed, and the said Totten and Carlisle are hereby authorized and directed to pay from the fund in their hands, a commission of five per centum on the cash coming into the hands of the said solicitors, and a further commission of five per centum on the cash value of the stocks and securities held by them for the services of the said several solicitors in the custody and management of said fund.

It is further ordered that the said account of said Totten and Carlisle be, and the same is hereby, approved and passed.

CHAS. C. COLE,
Asso. Justice.

Endorsed: No. 1132. D 11. *In re* estate of David McIntire. Order passing & approving account & report of Enoch Totten & Calderon Carlisle. Filed Jul- 7, 1896. J. Nota McGill, register of wills.

Order. Filed July 7, 1896.

In the Supreme Court of the District of Columbia, Holding Orphans' Court.

In re Estate of DAVID MCINTIRE, Deceased.

Upon consideration of the petition of Edwin A. McIntire, filed June 26, 1896, offering to give such additional bond as may be required of him as administrator *cum testamento annexo*, and upon hearing counsel, it is adjudged and ordered, this seventh day of July, A. D. 1896, that said administrator c. t. a. file an additional bond, with approved security, in the penal sum of one hundred thousand dollars, and thereupon shall be authorized and entitled to receive possession of all the assets of the estate of said David McIntire, deceased, now in the hands of Messrs. Totten and Carlisle under the orders of this court, less the commission this day allowed for the services of the solicitors having the custody and management of said estate, and to proceed with the administration and distribution thereof according to law and the last will and testament of said deceased.

CHAS. C. COLE,
Asso. Justice.

Endorsed: No. 1532. D 11. *In re* estate of David McIntire. Order authorizing delivery of assets to administrator c. t. a. & requiring bond of $100,000. Filed Jul- 7, 1896. J. Nota McGill, register of wills.

July 9, '96.—Adm'r c. t. a. s'g'd detached bond.

31 *Additional Bond.* 1834.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business. 1532 *l.*

DISTRICT OF COLUMBIA, *To wit:*

Know all men by these presents that we, Edwin A. McIntire, of the District of Columbia, and The American Bonding and Trust Company of Baltimore City, are held and firmly bound unto the United States of America in the full sum of one hundred thousand dollars, current money of said States, to be paid to the said United States, their certain attorneys or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, in and for the whole, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 9th day of July, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas the above-bounden Edwin A. McIntire has taken out from the supreme court of the District of Columbia letters of administration *cum testamento annexo* on the personal estate of David McIntire, late of the District of Columbia, deceased:

The condition of the above obligation is such that if the above-bounden Edwin A. McIntire shall well and truly perform the office of administrator c. t. a. of David McIntire, late of the District of Columbia, deceased, according to law, and shall in all respects discharge the duty of him required by law as administrator c. t. a. aforesaid, without any injury or damage to any person interested in the faithful performance of the said office, then the above obligation shall be void; it is otherwise to be in full force and virtue in law.

EDWIN A. McINTIRE. [SEAL.]
THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY, [SEAL.]
By JAMES BOND, *President.* [SEAL.]
Attest: JNO. T. STONE, *Secretary.* [SEAL.]

Signed, sealed, and delivered in the presence of—

S. THOMPSON, JR.,
As to E. A. McIntire.

Approved July 15th, 1896.
A. B. HAGNER.

DISTRICT OF COLUMBIA, *To wit:*

I, Edwin A. McIntire, do swear that I will well and truly administer the goods, chattels, personal estate, and credits of David McIntire, late of the District of Columbia, deceased, to the best of

my knowledge, according to law, and will give a just account
32 of my administration when thereto I shall be lawfully called, so help me God.

EDWIN A. McINTIRE.

Sworn and subscribed before me this 9th day of July, A. D. 1896.
Test: J. NOTA McGILL,
Register of Wills.

Petition. Filed June 2, 1897.

In the Supreme Court of the District of Columbia, Holding Orphans' Court.

In re Estate of DAVID McINTIRE, Deceased. No. 1532.

This petition of Martha McIntire, Elizabeth McIntire Test, Edwin A. McIntire, and Emma T. McIntire respectfully states:

1. That on December 18, 1896, this court approved and passed the second account of Edwin A. McIntire, administrator c. t. a. of said David McIntire, deceased, and on [January]* December 22, 1897, a further account was filed, both showing a large amount in cash and securities ready to be distributed to these petitioners.

2. That on or about January 9, 1897, counsel for Charles McIntire, Jr., filed written "exceptions" to both said accounts; which exceptions have not been brought to a hearing and have had the effect of staying any distribution of the assets. Said Charles McIntire, Jr., and his father, Charles McIntire, Sr., have been the unsuccessful litigants against the will of David McIntire since early in 1885, now over twelve years, during which the estate has been held undistributed. These petitioners are apprehensive that there will be further litigation and delay through the action of said Charles McIntire, Jr.

3. Even if said exceptions were sustained, which these petitioners do not expect, the effect would be to increase the amount to be distributed and to give these petitioners, together with the representatives of Adaline McIntire, deceased, one-half the residue of the estate.

The premises considered, petitioners pray that the court will authorize and direct a partial distribution of the estate, giving them at least one-half the shares shown to be due to them according to said accounts of the administrator c. t. a., and for such other and further relief as the case may require.

ENOCH TOTTEN,
Proctor for Petitioners.

Endorsed: No. 1532. D 11. Estate of David McIntire, deceased. Petition of Martha McIntire *et al.* for partial distribution. Filed Jun- 2, 1897. J. Nota McGill, register of wills.

[* Word enclosed in brackets erased in copy.]

No. 1532. Admn. Doc. 11.

Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

Amended second and final account of Edwin A. McIntire, administrator c. t. a. of the estate of David McIntire, deceased (died April 1, 1884), this account being filed by advice of counsel and to include additional items to July 31, 1887.

This accountant charges himself with the personal property (including that in the original inventory and appraisement, filed January 26, 1885, and recorded Liber of Inventories No. 13 H. J. R., folio 485) delivered to him by Messrs. Enoch Totten and Calderon Carlisle, solicitors for the respective parties under an order of the orphans' court passed July 7, 1896, and as shown by his receipt to said solicitors, as follows:

Certificate of receiver of German-Am. nat'l bank, dated Dec. 6, 1878, for $502.49.		
Appraised as worthless	$0.	$0.
Certificate No. 01151 for 42 shares Northern Pac. R. R. Co., $100 each.		
Appraised @	1,680.	
Now worthless	.....	0.
(This stock has become worthless thro' bankruptcy of the railroad Co.)		
Certificate No. 7829 of fractional dividend scrip Northern Pac. R. R. Co., 466.20.		
Appraised	466.20	
(Now worthless as above noted)	.....	0.
Two coupons, No. 916, for $30 each, Ches. & Ohio Coal & Lumber Co.		
Appraised @	0.	0.
Cash in current funds	8,328.93	8,328.93
Note of C. C. Duncanson, dated Aug. 22, 1893, due Aug. 22, 1895. Int. paid to Feb'y 22, 1896. Secured by deed of trust (being an investment made by said solicitors as custodians of the funds of estate)	5,000.00	5,000.00
Amounts forward	$15,475.13	$13,328.93
Amounts brought forward	$15,475.13	$13,328.93
U. S. 4 % consol bond, No. 190,119, for $100.		
Appraised @	122.00	122.00
Four (4) U. S. 4% consol bonds, No. 72489, 72490, 72491, and 72492, for $500 each.		
Appraised @	2,440.00	2,440.00
(Note.—The last coupons attached to the foregoing U. S. bonds bear date of April 1, 1885.)		
734 shares Pennsylvania R. R. Co. in 23 certificates, in the original inventory, and there appraised @ $51 per share (par $50)	37,434.00	37,434.00
59 shares Pennsylvania R. R. Co., certf. No. 320,545, issued in March, 1888, at par ($50 per share), in lieu of $2,950 of cash dividend	2,950.00	
Here charged to accountant at $51 per share to agree with above appraisement	.....	3,009.00
Divided scrip of Penna. R. R. Co., No. 1555, dated May 31, 1893, for	841.00	841.00
Total receipted for to solicitors	$59,262.13	
Actual value, omitting worthless assets and charging all Pa. R. R. stock @ $51 as appraised	.....	$57,174.93

See "Additional account" of this adm'r c. t. a., filed June 29, 1898.

34 This accountant also charges himself with the following assets never in the hands of the solicitors as custodians:

48 shares of the Penna. R. R. Co. issued in July, 1889, at par ($50), in lieu of cash as a dividend, here charged at $51 per share as above	.....	2,448.00
Amount forward	.....	$59,622.93
Amount brought forward	$59,622.93	
With a balance of cash in hands of this accountant from dividend Pa. R. R. Co., etc., as shown by his "Additional account," filed February 27, 1891	1,419.73	
1896. —— —. With dividend collected by accountant on Penna. R. R. stock	1,051.26	
1897. Jan'y 5. With interest paid by C. C. Duncanson on his note	150.00	
June 2. With dividend collected by accountant on Penna. R. R. stock	1,051.25	
	$63,295.17	
Also with the amount reported by arbitrators, by consent, as part of the estate, and receipted for in equal fourths of $2,500 each, February 25, 1885, by Emma T. McIntire, Martha McIntire, Adaline McIntire, and Elizabeth M. Test, four of the distributees of the estate	10,000.00	
	$73,295.17	

He claims credit and allowance for the following:

By paid Gibson Bros., printing brief,	Vou. 22...	$39.00		
" " Gibson Bros., printing brief,	" 23...	57.87		
" " Edwin Forrest, copy of opinion,	" 24...	2.55		
" " J. R. Young, copy of papers,	" 25...	2.20		
" " register of wills		1.00		
" " register of wills (this ac.)		31.47		
			.....	$134.09
" " commission on $73,295.17 at six *per cent*			.....	4,397.71
				$4,531.80
Balance for distribution			.....	68,763.37
			$73,295.17	$73,295.17

EDWIN A. McINTIRE,
Adm'r C. T. A.

Balance for distribution brought forward	.....	$68,763.37

Distributable in accordance with the provisions of the last will and testament of said decedent, recorded in Liber of Wills No. 21, at folio 234:

To each of the children of Edwin T. McIntire, deceased, the sum of $1,350.64, with interest thereon from July 1, 1854, to April 1, 1884	$3,761.53
Interest on the amount of said legacy at six per cent. per annum from April 1, 1885 (one year after death of testator), to Aug. 1, 1897	2,764.72
	$6,526.25

(Additional interest is to be computed to time of payment if delayed past Aug. 1, 1897.)

35	Martha McIntire	$6,526.25	
	Elizabeth M. Test	6,526.25	
	Edwin A. McIntire	6,526.25	
	Legal representatives of Adaline McIntire, dec'd.	6,526.25	
	Emma T. McIntire	6,526.25	
		.....	$32,631.25

The residue of $36,132.12 as follows:

To Martha McIntire,	1/6	.....	6,022.02
" Elizabeth M. Test,	"	.....	6,022.02
" Edwin A. McIntire,	"	.....	6,022.02
" legal representatives of Adaline McIntire,	"	.....	6,022.02
" Emma T. McIntire,	"	.....	6,022.02
" Charles McIntire, Jr.,	"	.....	6,022.02
		$68,763.37	$68,763.37

EDWIN A. McINTIRE,
Ad'r C. T. A. David McIntire.

DISTRICT OF COLUMBIA, *To wit:*

OFFICE OF THE REGISTER OF WILLS, *August 2nd*, 1897.

This day appeared Edwin A. McIntire, administrator c. t. a. of the estate of David McIntire, deceased, as aforesaid, and made oath on the Holy Evangels of Almighty God that the foregoing account, as stated, is just and true; that he has *bona fide* paid or secured to be paid the several sums for which he claims credit and allowance.

Test:

M. J. GRIFFITH,
[SEAL.] *Notary Public for the District of Columbia.*

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

On this 5th day of March, A. D. 1898, the foregoing account being now presented for approval, the same is, after examination by the court, approved and passed.

A. B. HAGNER, *Justice.*

Nunc pro tunc, this 4th May, '98.

Endorsed: No. 1532. D 11. *In re* estate of David McIntire, deceased. Amended second and final account of Edwin A. McIntire, administrator c. t. a. 1898, May 4: Approved & passed by the court, *nunc pro tunc*, as of March 5, 1898. Filed Aug. 2, 1897. J. Nota McGill, register of wills.

Exceptions. Filed October 22, 1897.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of DAVID MCINTIRE, Deceased. No. 1532, Adm'n Doc.

Comes now Charles McIntire, Jr., and excepts to the amended second and final account filed herein on the second day of August, 1897, by Edwin A. McIntire, administrator c. t. a.

First. For that the said accountant should have charged himself

with the sum of five thousand one hundred and ten dollars,
36 the amount suppr-ssed by him from his inventory filed in this cause and with interest thereon from the 18th day of April, 1884.

Second. For that the said accountant should have charged himself with interest from April 18th, 1884, on the sum of ten thousand dollars, a further sum suppressed by him from his inventory filed in this cause.

Third. For that the said accountant should have included as already distributed to the several legatees under said will, except to this exceptant, the sum of eleven thousand five hundred dollars heretofore paid out to the counsel of said legatees under the orders of this court and properly chargeable to the shares of all the distributees under said will, except this exceptant's share.

Fourth. For that the said accountant in the said account claims credit for forty-seven hundred and ninety-three dollars and seventy-one cents, commissions on said estate; whereas the right of said accountant to any commissions has already been adjudicated by a final judgment in this cause, passed on the 19th day of February, 1885; which said order remains in full force, unreversed and unappealed from, and by which the right of said accountant to any commissions was finally and conclusively adjudged against him.

Fifth. For that in the said accountm the said accountant undertakes to distribute the sum of thirteen hundred and fifty dollars and sixty-four cents, with interest from July 1, 1854, to April 1, 1884, to each of the children of Edwin T. McIntire, deceased, whereas by the terms of said will that amount is distributable to all of said children collectively *per stirpes* and not *per capita*.

Sixth. For that the said accountant in the said account undertakes to distribute the residue of said estate among the children of Edwin T. McIntire and Charles McIntire *per capita*, whereas by the terms of said will the said residuum of said estate is distributable between the children of the said two brothers of said testator *per stirpes* and not *per capita*.

Seventh. For that the said accountant should have charged himself with the sum of three hundred dollars interest to August 22, 1897, on the note of Charles C. Duncanson.

Eighth. For that the said accountant should have charged himself with interest upon the sum of fourteen hundred and nineteen dollars and seventy-three cents from the date it was collected by him, because the same was wrongfully received and retained by him in violation of the orders of this court, instead of being paid over by him to the custodians appointed by this honorable court to receive said sum.

Ninth. For that the said accountant in the said account undertakes to allow interest from April 1, 1885, to date of payment to each of the children of Edwin T. McIntire on the legacy of $3,761.53, whereas, even though this court shall decide that each of said children is entitled to said legacy, which this exceptant does not admit, but expressly denies, as appears by his fifth exception, one of said children, to wit, Edwin A. McIntire, had received out

of said estate and appropriated to his own use in April,
37 1884, the sum of $5,110, and the remaining four children had in April, 1884, each received out of said estate the sum of twenty-five hundred dollars, as appears by their receipts filed herein; and, furthermore, there had been paid from time to time, beginning in the year 1884, the sum of eleven thousand five hundred dollars to the counsel of the said five children, which sums are properly chargeable, first, in liquidation of the special legacy aforesaid, and, secondly, in liquidation of the distributive shares of said children in the residuum of said estate, so that on a proper accounting it will appear that the special legacy aforesaid had been fully paid to said legatees before said first day of April, 1885.

Tenth. For that the said accountant in the said account has distributed the said estate in entire disregard of the terms of the will of the deceased and of the law governing the same and has wrongfully allowed interest on certain legacies.

CARLISLE & JOHNSON,
Counsel for Charles McIntire, Jr.

Endorsed: 1532, Adm. Doc. 11. *In re* estate of David McIntire, deceased. Exception to amended second & final account of Edwin A. McIntire. Filed Oct. 22, 1897. J. Nota McGill, register of wills.

Order. Filed December 9, 1897.

In the Supreme Court of the District of Columbia, Holding Orphans' Court.

In re the Estate of DAVID MCINTIRE, Deceased. No. 1532, Adm'n Docket.

On motion of Edwin A. McIntire, administrator c. t. a. herein, by his proctor, and all parties interested in the said estate of David McIntire, deceased, consenting thereto, by their proctors, who sign their assent to this order, it is ordered by the court this 9th day of December, 1897, that said administrator c. t. a. be, and he is hereby, authorized, empowered, and directed to make a partial distribution of the said estate in advance of the final settlement of his accounts and the exceptions thereto; and he is further ordered, directed, and empowered to pay to the parties hereinafter named or their respective proctors, on account of their respective claims, the following sums and none other, to wit:

To the children of Edwin T. McIntire, deceased—that is to say, to Edwin A. McIntire, Martha McIntire, Emma T. McIntire, Elizabeth Test—and to Sarah McIntire, widow of said Edwin T. McIntire and assignee of Adaline McIntire, the aggregate sum of fourteen thousand (14,000) dollars, said amount to be paid and satisfied to them by the transfer to them of one hundred and sixty-one (161) shares of the stock of the Pennsylvania Railroad Company, appraised at $51 per share, equivalent to $8,211, and from the money in safe

deposit the sum of five thousand seven hundred and eighty-nine (5,789) dollars in cash.

38 To Charles McIntire, Jr., son of the late Charles McIntire, the sum of six thousand and twenty-two dollars and two cents ($6,022.02), said amount to be paid and satisfied to him by the transfer to him of sixty-nine (69) shares of said stock, appraised at $51 per share, equivalent to $3,519, and from the money in safe deposit the sum of twenty-five hundred and three dollars and two cents ($2,503.02) in cash.

This order is made without prejudice to the claims of any of the parties interested in said estate as to the proper construction of the last will of said David McIntire or any part thereof, the accounts of said administrator c. t. a., or the distribution of said estate, the rights of each and every one of the parties being hereby expressly reserved.

A. B. HAGNER,
Asso. Justice.

We consent to the above.
ENOCH TOTTEN,
For Adm'r & Children of Edwin T. McIntire & for Sarah McIntire.
CALDERON CARLISLE,
WM. G. JOHNSON,
For Charles McIntire, Jr.

Endorsed: No. 1532. D 11, adm'n doc. McIntire, David, estate of. Order (by consent) for partial distribution by adm'r c. t. a. Filed Dec. 9, 1897. J. Nota McGill, register of wills.

Order. Filed March 5, 1898.

In the Supreme Court of the District of Columbia, Holding a Term for Orphans' Court Business.

In re Estate of DAVID McINTIRE, Deceased.

This cause came on for hearing upon the exceptions filed on behalf of Charles McIntire, Junior, to the second amended final acc't of Edwin A. McIntire, filed in this court on the 2d of August, 1897, and the same were argued by counsel and considered by the court.

It is thereupon, this 5th day of March, 1898, by the authority of this court, adjudged and ordered—

That the exceptions aforesaid (excepting that marked "*First*," which has been withdrawn) be, and the same are hereby, *overruled*.

A. B. HAGNER,
Asso. Justice.

Endorsed: No. 1532. D 11, adm'n docket. *In re* estate of David McIntire. Order overruling exceptions. 5 March, 1898. Filed Mar. 5, 1898. J. Nota McGill, register of wills.

39 *Appeal. Filed March* 10, 1898.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of DAVID MCINTIRE. No. 1532, Adm'r Docket.

Comes now Charles McIntire, Jr., by his counsel, and appeals to the Court of Appeals from the order passed herein on the fifth day of March, A. D. 1898, overruling his exceptions to the account of Edwin A. McIntire, administrator c. t. a. of said David McIntire.

CARLISLE & JOHNSON,
Counsel for Charles McIntire, Jr.

The register of wills will please enter the above appeal to the Court of Appeals.

CARLISLE & JOHNSON.

Endorsed: No. 1532, adm'n doc. 11. *In re* estate of David McIntire. Appeal to Court of Appeals from order of March 5, 1898. Filed Mar. 10, 1898. J. Nota McGill, register of wills.

Order. Filed March 24, 1898.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of DAVID MCINTIRE, Dec'd.

Charles McIntire, Jr., having appealed to the Court of Appeals from the order passed herein on the 5th day of March, 1898, overruling his exceptions to the account of Edwin A. McIntire, administrator c. t. a., the court now fixes the amount of the security for costs on said appeal at two hundred dollars, and the said Charles McIntire shall have leave to deposit that sum with the clerk of the supreme court of the District in lieu of a bond therefor.

A. B. HAGNER.

March 24, '98.

I consent.

ENOCH TOTTEN,
For E. A. McIntire et al.

Endorsed: No. 1532, adm'n doc. 11. Estate of David McIntire. Order fixing amount & method of security for costs on appeal by Chas. McIntire. Filed Mar. 24, 1898. J. Nota McGill, register of wills.

40 *Order. Filed April* 5, 1898.

In the Supreme Court of the District of Columbia.

In re Estate of DAVID MCINTIRE, Dec'd. No. 1532, Adm. Doc.

On motion of Carlisle and Johnson, solicitors for Charles McIntire, and solicitor for the other parties in interest consenting thereto, it is by the court, this 5th day of April, A. D. 1898, ordered that the time for preparing and filing the transcript on appeal of said Charles McIntire, Jr., to the Court of Appeals of the District of Columbia be, and the same hereby is, extended for thirty days from this date.

A. B. HAGNER,
Asso. Justice.

I consent to the above.
ENOCH TOTTEN,
Sol'r for E. A. McIntire et al.

Endorsed: No. 1532, adm. doc. 11. *In re* est. of David McIntire. Order extending time for preparing & filing transcript on appeal of Charles McIntire. Filed Apr. 5. 1898. J. Nota McGill, register of wills.

Order. Filed May 4, 1898.

In the Supreme Court of the District of Columbia, Holding Orphans' Court.

In re Estate of DAVID MCINTIRE, Deceased. No. 1532.

On motion of the administrator c. t. a. and by consent of the legatees and distributees under the last will of David McIntire, deceased, by their respective solicitors, it is adjudged and ordered this 4th day of May, A. D. 1898, as of the 5th day of March, 1898, now for then, that the order passed on said 5th day of March, 1898, overruling the exceptions to the amended second and final account of said administrator c. t. a. (filed herein August 2, 1897), be, and the same is hereby, modified, in order to conform to the decision of the court, so as not only to overrule said exceptions, but also to approve and pass the said account and direct distribution to be made thereunder: *Provided*, however, that the consent of the exceptant, Charles McIntire, Jr., to this modification of said order of March 5, 1898, is not to prejudice or operate against the appeal heretofore taken by him from said order, but is a consent only to the form of the order.

A. B. HAGNER.

We consent.
ENOCH TOTTEN,
Proctor for the Administrator c. t. a., for Sarah McIntire, and the Children of Edwin T. McIntire.
CARLISLE & JOHNSON,
Proctors for Charles McIntire, Jr.

41 Endorsed: No. 1532. D 11. Estate of David McIntire, deceased. Order *nunc pro tunc* modifying order of March 5, 1898, so as to approve ac. & direct distribution. Filed May 4, 1898. J. Nota McGill, register of wills.

Order. Filed May 4, 1898.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of DAVID MCINTIRE. No. 1532, Adm'n Doc.

It appearing to the satisfaction of the court that it is impossible for the clerk to complete the transcript on appeal in this case by the fifth day of May, A. D. 1898, and counsel for all parties consenting to this order, it is by the court this 4th day of May, 1898, adjudged, ordered, and decreed that the time for filing the transcript in the Court of Appeals on appeal of Charles McIntire to the Court of Appeals be, and the same hereby is, extended for thirty days from this date.

A. B. HAGNER.

We consent.

ENOCH TOTTEN,
For Adm'r c. t. a., for Sarah McIntire, and for Children of E. T. McIntire.
CARLISLE & JOHNSON,
For Charles McIntire, Jr.

Endorsed: No. 1532. D 11. Estate of David McIntire, dec'd. Order extending time for filing transcript in Court of Appeals. Filed May 4, 1898. J. Nota McGill, register of wills.

42 Supreme Court of the District of Columbia.

No.	Parties.	Action.	Plaintiff's attorney.	Costs.
27815	Charles McIntire, Sr., vs. Edwin A. McIntire et al.	Issues from probate.	C. Carlisle. Defendants' attorney: S. S. Henkle.	Attorney.. Marshal.... Clerk..... Witnesses.. Depositions.

Date.	Proceedings.	Clerk's costs.
1887, May 23	Deposit toward costs, $10, by Wm. G. Johnson, order, &c., certified copy of issues filed.	
1888, Feb'y 6	Appearance of Henkle for def't- filed.	
	Def'ts' witnesses: Philip Pollard, 4 days: C. A. Prentiss, 3 days; D. W. Prentiss.	
	" " Wm. R. Bouis, Benj. F. Dyer, 3 days; Wm. Helmick, 3 days.	
	" " Geo. W. Nagle, and 4 days; Eunice Canfield, 3 days; D. W. Prentiss, 3 days.	
" " 27	Jury sworn and respited (M. 23, p. 53).	
" " 28	Trial resumed and jury again respited from day *to day* (M. 23, pp. 54, 55).	
" M'ch 2	Answers to issues, viz: to 1, yes; 2, yes; 3, no; 4, no; 5, no; 6, no; 7, no, and 8, no (M. 23, p. 56).	
" " 5	Motion for new trial, discretion of court, filed, &c. (M. 23, p. —).	
" " 5	" " " " on exceptions, filed, &c. (M. 23, p. —).	
" " 6	" " " " " 1, 4, 6, 7, & 8 issues filed by pl'ff (M. 23, p.—).	
" April 28	Amended motion for new trial filed, entered (M. 23, p. —).	
" May 5	Verdict set aside & new trial granted, appeal by caveator (M. 23, p. 163).	
" June 25	Caveator's bill of exceptions filed, enter- (M. 23, p. 225).	
" Oct. 26	10 copies of printed record filed.	
" " 30	Motion to dismiss appeal "	
" Dec. 17	Appearance of Carlisle for pl'ff; appeal to general term entered, dismissed; order pl'ff's att'y filed.	
1889, June 26	Jury sworn and respited (M. 24, p. 135).	
" " 27	Trial resumed and jury again respited (M. 24, pp. 137, '8, '40, '1, '5).	
" July 5	Answers to issues sustaining will (M. 24, p. 147).	
" " 6	Motion for new trial on exceptions filed, &c. (M. 24, p. 157).	
" " 11	Term of court prolonged to 1st Monday of Oct. next to settle bills of exceptions (M. 24, p. 157).	
" Oct. 7	Pl'ff's bills of exceptions & Exhibits "A" and "B" filed, &c. (M. 24, p. 163).	
1890, Nov. 20	Death of Charles McIntire, Sr., suggested; motion that Charles McIntire, Jr., administrator of said decedent be made party; affi. in support & copy of letters of administration filed.	
" " 20	Chas. McIntire, Jr., adm'r, made party (6 M. G. T., p. 487).	
	10 copies printed record filed.	
1891, Jan'y 3	Verdict, &c., sustaining will; affi. motion for new trial overruled (6 M. G. T., p. 509).	
" " 15	Certified copies of answers to issues sent down.	

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing is a true copy of the docket entries in the cause of Charles McIntire, Sr., *vs.* Edwin A. McIntire *et al.*, No. 27815, at law, in said court.

43 In testimony whereof I hereunto subscribe my name and affix the seal of said court this 24th day of April A. D. 1902.
[SEAL.] JOHN R. YOUNG, *Clerk.*

(Endorsement:) Estate of David McIntire. Certified copy of docket entries in suit at law No. 27815, McIntire *vs.* McIntire. Filed, Apr. 26, 1902, Louis A. Dent, register of wills, D. C. Clerk of probate court.

44 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the justices of the supreme court of the District of Columbia, Greeting:

Whereas, lately in the supreme court of the District of Columbia, before you or some of you, in a cause entitled *In re* Estate of David McIntire, deceased, probate No. 1532, wherein the order of the said supreme court entered in said cause on the 5th day of March, A. D. 1898, is in the following words, viz:

"*In re* Estate of DAVID MCINTIRE, Deceased.

This cause came on for hearing upon the exceptions filed on behalf of Charles McIntire, Junior, to the second amended final acc't of Edwin A. McIntire, filed in this court on the 2d of August, 1897, and the same were argued by counsel and considered by the court.

It is thereupon, this 5th day of March, 1898, by the authority of this court, adjudged and ordered—

That the exceptions aforesaid (excepting that marked "first," which has been withdrawn) be, and the same are hereby, overruled.

A. B. HAGNER,
Asso. Justice."

as by the inspection of the transcript of the record of the said supreme court, which was brought into the Court of Appeals
45 of the District of Columbia by virtue of an appeal, taken by Charles McIntire, Jr., whereon Edwin A. McIntire, administrator c. t. a. of David McIntire, deceased, was made the party appellee, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas in the present term of January, in the year of our Lord one thousand eight hundred and ninety-nine, the said cause came on to be heard before the said Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that the order of the said supreme court in this cause be, and the same is hereby, reversed; costs to be charged to the estate; and it is further ordered that this cause be, and the same is hereby, remanded to the said supreme court for further proceedings in settlement of the account and final distribution not inconsistent with the opinion of this court.

FEBRUARY 28, 1899.

You therefore are hereby commanded that such further proceedings be had in said cause in conformity with the opinion and judgment of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Richard H. Alvey, Chief Justice of said Court of Appeals, the 31st day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

46 Case No. 817.

Court of Appeals of the District of Columbia, January Term, 1899.

Charles McIntire, Jr., to Robert Willett, clerk of the Court of Appeals of the District of Columbia, Dr.

For costs on an appeal from the supreme court of the District of Columbia taken by Charles McIntire, Jr., against Edwin A. McIntire, adm'r, &c.:

Clerk	12.80
Printing	77.62
	$90.42

189–, ——.—Received payment per check Carlisle and Johnson.
ROBERT WILLETT,
Clerk Court of Appeals D. C.

(Endorsements:) Court of Appeals of the District of Columbia. No. 817, Jan'y term, 1899. Charles McIntire Jr. appellant *vs.* Edwin A. McIntire adm'r &c. Mandate. Filed Mar. 31, 1899, J. R. Young, clerk. Filed March 31, 1899. J. Nota McGill, register of wills.

47 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of DAVID MCINTIRE, Dec'd. No. 1532, Admin. Doc. 11.

I, Edwin A. McIntire, administrator c. t. a. of the estate of David McIntire, dec'd, do solemnly swear that acting on the advice of my counsel the late S. S. Henkle, who was then also one of the custodians of the estate, I made the disbursements shown in my account of February 27, 1891 and retained in my possession the sum of $1419.73 the balance shown by that account.

With the advice of my said counsel to retain possession of said balance for such incidental expenses as might be necessary for the benefit of the estate and with full knowledge of four of the legatees, I placed said balance in a box in the Safe Deposit Co. in the name

and control of myself and my sister Emma T. McIntire, who is also a legatee and in said box I also placed my own will which was witnessed by the late S. S. Henkle and the late Randall Hagner, requesting my said sister to represent me in the event of my death.

The said amount has remained in said box intact and is there today, excepting only what *sam*ll sums have been used to pay for printing and for court costs in connection with the litigation pertaining to said estate.

No portion of said amount has ever been used except as above stated.

EDWIN A. McINTIRE.

48 Sworn to and subscribed before me this 28" day of June A. D. 1899.

[SEAL.]

M. J. GRIFFITH,
Notary Public.

I, Emma T. McIntire, a legatee under the will of David McIntire, dec'd do solemnly swear that to my certain knowledge the said sum of $1419.73 shown by my brother, E. A. McIntire's account of February 27" 1891 as administrator &c. was deposited by him on or about that date in the Safe Deposit Company in a box under his and my control with the understanding that I should represent my said brother in the management of his business in the event of his death. That said funds were so deposited at the suggestion of counsel and the amount has not been disturbed except only to pay for printing and for court costs in connection with the litigation over said will and that said amount has with that exception remained intact and is now and has been since the day of its deposit in said Safe Deposit Company.

EMMA T. McINTIRE.

Sworn to and subscribed before me this 28th day of June A. D. 1899.

[SEAL.]

M. J. GRIFFITH,
Notary Public.

(Endorsement:) McIntire estate. "Exhibit E. A. M. No. 1" to second and final account of adm'r c. t. a. (as restated) Filed, Jan. 19, 1900, Louis A. Dent, register of wills, D. C.

49 No. 1532, Adm'n Doc. 11.

Supreme Court of the District of Columbia, Holding a Probate Court.

Second Account of Edwin A. McIntire, Administrator cum Testamento Annexo of the Estate of David McIntire, Deceased (Died April 1, 1884).

Original presented Aug. 2, 1897, now restated in consequence of the decision of the Court of Appeals, D. C., rendered Feb'y 28, 1899, and mandate thereon.

This accountant is here charged with the personal property (including that in the inventory and appraisement, filed January 26, 1885, and recorded in Liber of Inventories No. 13 H. J. R. folio 485.) delivered to him by Messrs. Enoch Totten and Calderon Carlisle, solicitors for the respective parties under an order of the orphans' court passed July 7, 1896, and shown by his receipt to said solicitors in the manner following, that is to say:

Certificate of receiver of German-American national bank dated Dec. 6, 1878 for $502.49.		
Appraised as worthless	0.	0.
Certificate No. 01.151 of Northern Pacific R. R. Co. for 42 shares of $100 each, appraised @	1680.	
Now worthless		0.
Certificate No. 7829 of fractional dividend scrip Northern Pacific R. R. Co. for $466.20, appraised @	466.20	
Now worthless		0.
Two coupons Chesapeake & Ohio Coal & Lumber Co. No. 916 for $30 each, appraised as worthless	0.	0.
Cash in current funds	8328.93	8328.93
Note of C. C. Duncanson, dated August 22, 1893, due August 22, 1895. Interest paid to solicitors to February 22. 1896, secured by deed of trust (being an investment made by said solicitors, as custodians of the funds of the estate)	5000.	5000.
U. S. 4% consol bond No. 190119 for $100, appraised @	122.	122.
50 Four U. S. 4% consol bonds Nos. 72.489, 72.490, 72.491 and 72492 for $500 each, $2,000, appraised @	2440.	2440.
734 shares Pennsylvania R. R. Co. in 2's certificates in original inventory par $50, appraised @ $51	37434.	37434.
Amounts carried forward	$55471.13	$53324.93
59 shares Pennsylvania R. R. Co. Certf. No. 320.545 issued in March 1888 at par ($50 per share) in lieu of $2950 of cash dividend	2950.	
Here charged to accountant @ $51 per share to agree with aforesaid appraisement		3009.
Dividend scrip of Penna. R. R. Co. No. 1555 dated May 31, 1893 for	$841	
Exchanged per order of court of Feb'y 11, 1898 for 16 shares Penna. R. R. stock @ 50	$800	
And cash	41	
	841.	
Said 16 shares are here charged to accountant at $51 to agree with said appraisement	$816	
And cash as above	41	857.
Total receipted to solicitors	$59262.13	
Value thereof after omitting worthless assets, and charging all Pennsylvania R. R. stock at $51 per share (the appraised value)		57190.93
This accountant is also charged with the following assets which were not in the hands of the solicitors as "custodians" viz:		
48 shares of the Pennsylvania R. R. Co. issued in July 1889, at par ($50) in lieu of cash as a dividend here charged at $51 per share, as above		2448.
With a balance in the hands of the administrator c. t. a. from dividend Penna. R. R. Co. etc., as shown by his "additional account" filed Feb'y 27, 1891 and retained for reasons stated in affidavits herewith filed marked Exhibit E. A. M. No. 1 to this account		1419.73
Amount carried forward		$61058.66

	Amount brought forward				$61058.66
	With coupons on $2100 U. S. 4% bonds from April 1, 1885 to April 1, 1901				1344.
	With interest collected by administrator c. t. a. on $5000 Duncanson note:				
51					
1897.					
Jan'y 5.	Duncanson interest			$150.	
Aug. 7.	"	"		150.	
1899.			300.		
April	"	"	150.	450.	
1900.					
Feb'y 19.	"	"		300.	
July	"	"		150.	
1901.					
Jan'y	"	"		150.	
May	"	"		150.	
	Total interest Feb'y 22, '96, to Feb'y 22, 1901				1500.
	With dividends collected by administrator c. t. a. on Penna. R. R. stock, viz:				
1896.					
Nov.	Dividend			$1051.26	
1897.					
June 2.	"			1051.25	
Nov. 30.	"			1051.25	
1898.					
May 31.	"			763.75	
Nov. 30.	"			763.75	
1899.					
June 2.	"			783.75	
Nov.	"			783.75	
1900.					
May	"			783.75	
Nov.	"			1097.25	
1901.					
June				783.75	
					8913.51
	Proceeds of sale of 209 warrants Pennsylvania R. R. as per order of court of June 12, 1901				3082.75
	Also with amount reported by "arbitrators," by consent, as part of the estate and receipted for in equal fourths of $2500 each Feb'y 25, 1885 by Emma T. McIntire, Martha McIntire Adaline McIntire and Elizabeth M. Test, four of the legatees			$1000.	
	And under the decision of the Court of Appeals—not assented to by the administrator c. t. a. with interest thereon from April 8, 1884 to February 25, 1885, @ 6 % per annum			511.50	
					10511.50
	Amount carried forward				$86410.42
	And under the said decision,—but not assented to by the administrator c. t. a. with the amount paid to S. S. Henkle, March 6, 1886 by the custodians of the fund, the same to be hereinafter charged against the special legatees				500.

		He is here credited with the following disbursements, to wit:			
		By paid Gibson Bros. printing brief vou. 22	.....	.....	$39.
		" " " " " " " " 23	.....	.....	57.87
		" " Edwin Forrest, copy of opinion vou. 24	..	.....	2.55
		" " clerk of court " papers " 25	..	.....	2.20
53		By paid register of wills	.....	.....	1.
		" " " " " (this ac.)	.....	.....	31.47
1898.					
May	28.	" " rent of box in Safe Deposit Co. 2 yrs	.....	.....	5.
1899.					
Feb'y	3.	" " Gibson Bros. printing brief	.....	.....	14.50
April		" " Safe Deposit Co., rent of box 3 yrs. to April 18, 1902	.....	.....	7.50
1901.					
June	11.	" " register of wills (pd. under protest)	.....	.....	44.02
	12.	" " " " " "	.....	.....	2.08
		" amount retained to meet claim of Charles McIntire, Jr., for costs in Court of Appeals	....	.....	90.42
		Paid bonding Co. for administrator's bond $100.			297.61
		The administrator c. t. a. respectfully reserves his claim to commissions which were allowed to him by the justice holding orphans' court, but were directed to be omitted by the Court of Appeals, and he desires to preserve his rights in case of further appeal.			
		Balance for distribution carried forward	...	....	86612.81
				$86910.42	$86910.42
		Balance for distribution brought forward	..	$86612.81	
		Distributable in pursuance of the provisions of the last will and testament of said David McIntire, deceased, and the mandate of the Court of Appeals, not assented to by the administrator c. t. a. as follows:			
		To each of the five children of Edwin T. McIntire, deceased, the sum of	.....	$1350.64	
		With interest thereon from July 1, 1854 to April 1, 1874, 29 yrs. 9 mos. @ 6 %	..	2410.89	
				$3761.53	
		To Martha McIntire the above sum	....	$3761.53	
		Less amount receipted for by her Feb'y 25, '85	.....	2500.	..... 2500.
				1261.53	
		Interest on $1261.53 from Ap'l 1, '85, to March 6, '86	.....	70.40	
				1331.93	
		Less ⅓ of $500 paid S. S. Henkle by register of wills on March 6 1886	.....	100.	..... 100.
				1231.93	
		Interest on $1231.93 from March 6, 1886 to January 1, 1898	.....	873.62	
				2105.55	..... 2105.55
		Paid her on Jan'y 1, 1898 ⅓ of $14.000	..	2800.	
83		Overpayment on ac. of special legacy	...	694.45	
		To be charged as an advance on account of her share of residuum	.....	.....	4705.55

To Elizabeth M. Test the same amount as above computed..		.....	4705.55
" the legal representative of Adaline McIntire, deceased, the same amount as above computed.....		.....	4705.55
" Emma T. McIntire the same amount as above computed.		.....	4705.55
Amounts carried forward.....		$86612.81	$18822.20
To Edwin A. McIntire special legacy $1350.64 & int. 2410.89	$3761.53		
Less interest on $10,000 directed by the Court of Appeals to be thus charged, as of Feb'y 25, 1885.....	511.50	.....	511.50
	$3250.03		
Add interest on $3250.03 from April 1, 1885 to Oct. 6, 1885	100.		
	3350.03		
Less ⅓ of $500 paid by register of wills to S. S. Henkle March 6, 1886.....	100.	.....	100
	3250.03		
Interest on $3250.03 from Oct. 6, 1885 to March 6, 1891	1056.25		
	4306.28		
Less amount retained by administrator c. t. a. from "custodians" to be charged against his special legacy as of March 6, 1891.....	1419.73	.....	1419.73
	2886.55		
Interest on $2886.55 from March 6, 1891 to Jan'y 1, 1898.....	1180.56		
	4067.11		
Less amount paid under order of Dec. 9, 1897..	2800.	.....	2800.
	1267.11		
Interest on $1267.11 from Jan'y 1 '98 to October 1, 1900.....	209.07		
54 Balance due Edwin A. McIntire on ac. of his special legacy.....	1476.18	.....	1476.18
With additional interest on $1476.18 from Oct. 1, 1900 @ 6 % until paid.			
			25129.61
Residuum.....	.....	.....	61483.20
		$86612.81	$86612.81
Residuum down, carried forward.....	.....	$61483.20	
Distributable:			
To Martha McIntire	⅛..	.....	$10247.20
" Elizabeth M. Test.....	"...	.....	10247.20
" Edwin A. McIntire.....	"...	.....	10247.20
" the legal representative of Adaline McIntire, deceased,	"...	.....	10247.20
" Emma T. McIntire.....	"...	.....	10247.20
" Charles McIntire Jr.....	"...	.....	10247.20
		$61483.20	$61483.20

Individual Account with Legatees Based on Foregoing Statement of Account.

Martha McIntire's share of the residuum amounts to	$10247.20	
Less overpayment to her on special legacy	694.45	
Balance due Martha McIntire	.....	9552.75
Elizabeth M. Test ...same..	.....	9552.75
Legal representatives of Adaline McIntire, deceased, " ..	.....	9552.75
Emma T. McIntire " ..	.....	9552.75
Edwin A. McIntire bal. due him on special legacy	$1476.18	
Amount of his share of residuum	10247.20	
Total amount due Edwin A. McIntire	.....	11723.38
Charles McIntire Jr. amount of his share of residuum	10247.20	
Less amount paid him under order of court of Dec. 9, 1897	6022.22	
Balance due Charles McIntire Jr		4224.98
Balance due said distributees	.....	$54159.36

Investment Account.

55	Balance due distributees brought from page 7	$54159.36	
	Invested as follows, viz.		
734			
230			
— 504			
59			
16			
48			
	627 shares Penna. R. R. stock, appraised @ $51 per share	.....	$31977.
	$2100 U. S. 4 % coupon bonds appraised @ 122	.....	2562.
	Note of Chas. C. Duncanson	.....	5000.
	Cash	.....	14620.36
		$54159.36	$54159.36

Under the order of Dec. 9, 1897, there was distributed to Edwin A. McIntire Emma T. McIntire Martha McIntire Elizabeth M. Test and to Sarah McIntire widow of Edwin T. McIntire and assignee of Adaline McIntire

161 shares of Penna. R. R. stock @ $51 ea	$8211.
And cash	5789.
	$14000.

And to Charles McIntire Jr.

69 shares Penna. R. R. stock @ $51 ea	3519.
And cash	2503.02
	$6022.02

230 shares Penna. R. R. stock distributed, appraised @ $51 per share, $11,730.

56 (Endorsement:) Estate of David McIntire. Second & final account of administrator c. t. a. restated in accordance with mandate of Court of Appeals. Approved and passed by order of court, March 21, 1902. (Appeal taken by both parties.) Filed Mar. 21, 1902. Louis A. Dent, register of wills, D. C. Clerk of probate court.

57 In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re Estate of DAVID MCINTIRE, Deceased. No. 1532, Adm. Doc.

Comes now Charles McIntire, Jr., and excepts to the second and final account of Edwin A. McIntire, administrator c. t. a. of the estate of David McIntire, deceased, filed herein on the 21st day of March, 1902, which account was restated in consequence of the decision of the Court of Appeals of the District of Columbia of February 28, 1899, and the mandate thereon.

First. For that the sum of eleven thousand dollars, counsel fees heretofore paid out to Messrs. Saul S. Henkle and Enoch Totten, counsel for the children of Edwin T. McIntire and their assignees, legatees under the will of said David McIntire, are properly chargeable and should be charged as payments on account of the distributive shares of Edwin A. McIntire, Emma T. McIntire, Elizabeth M. Test, Martha McIntire, and Adeline McIntire, and should not be charged against the estate of said David McIntire.

Second. Because said account undertakes to distribute the residuum of said estate among the children of Edwin T. McIntire and Charles McIntire *per capita;* whereas, by the terms of said will, the said residuum of said estate is distributable between the children of the said two brothers of the said testator *per stirpes* and not *per capita.*

CHARLES McINTIRE, JR.,
By WM. G. JOHNSON,
His Attorney.

(Endorsement:) *In re* estate of David McIntire. Exceptions of Charles McIntire Jr. to account of administrator. Filed Mar. 21, 1902. Louis A. Dent, register of Wills, D. C. Clerk of probate court.

58 In the Supreme Court of the District of Columbia, Holding the Probate Court.

In re Estate of DAVID MCINTIRE, Deceased. No. 1532.

Exceptions.

Now comes Edwin A. McIntire, administrator *c. t. a.* of the estate of David McIntire, deceased, and respectfully objects and excepts to the second and final account of said estate as restated under the direction of this honorable court, in and upon each of the following grounds—that is to say:

1. Because in the said restatement neither the commission allowed to the administrator c. t. a. in the former statement by the special term for orphans' court business, (which has exclusive jurisdiction to allow commissions, without a right of appeal therefrom) nor the minimum commission of five per centum established by statute, is credited to the administrator c. t. a., although the assets of the estate were duly restored to his custody, by order of the court, on his giving

an additional bond of $100,000, and he has been and is actively administering them under the direction of the court.

2. Because the partial distribution of $2,800 each made on or about January 1, 1898, to the children of Edwin T. McIntire
59 ought to be charged, not against the amount of the special legacies to them, but against their shares of the residue, as the distribution of $6,022.22 at the same time to Charles McIntire, Jr., is charged against his share of the said residue.

3. Because the $500 paid March 6, 1886, to Saul S. Henkle, Esq., attorney and counsellor, for defending the last will of said deceased, ought to be allowed as a credit against the estate.

4. Because the administrator c. t. a. is charged with $511.50 interest on an amount of $10,000, although no interest is mentioned in the arbitrators' report or order of court thereon, and he assumed said sum because it was receipted for to him by four of the distributees, within one year from the date of testator's death.

5. Because the sum of $1419.73 held by the administrator c. t. a. under advice of his counsel for the needs of the estate is charged against his special legacy as of March 6, 1891, thereby in effect charging him with interest on said sum from that date, although he reported it to the court and no complaint was made in regard to his retaining it.

6. For the other causes apparent upon the face of said account.

WM. HENRY DENNIS,
DAVIS & TUCKER,
Attorneys for Administrator c. t. a.

(Endorsement:) Estate of David McIntire, deceased. Exceptions in behalf of adm'r c. t. a. to final account as restated under mandate of Court of Appeals. Filed Mar. 21, 1902. Louis A. Dent, register of wills, D. C. Clerk of probate court.

60 In the Supreme Court of the District of Columbia, Holding the Probate Court.

In re Estate of DAVID MCINTIRE, Deceased. No. 1532, Adm. Doc. 11.

Decree.

This cause coming on to be heard upon the restated account filed on this 21st day of March, 1902, and the exceptions thereto, filed on behalf of the administrator *c. t. a.* and the other children of Edwin McIntire, deceased, and also upon the exceptions filed on behalf of Charles McIntire, Jr., and it appearing to the court that such account, as restated, is in accordance with the mandate of the Court of Appeals, filed on the 31st day of March, 1899, it is this 21st day of March, 1902, adjudged, ordered and decreed that said exceptions, and each of them, be and the same are hereby overruled, and said account as restated be, and the same is hereby approved and passed, and the administrator *c. t. a.* directed to make distribution of the estate in accordance therewith.

And from so much of said order as overrules the exceptions of said Charles McIntire, Jr., and approves and passes the said account, the said Charles McIntire, Jr., appeals in open court to the Court of Appeals; and the penalty of his bond on appeal (to act as a supersedeas) is hereby fixed at one hundred dollars.

61 And from so much of said order as overrules the exceptions of the said administrator *c. t. a.*, and the children of Edwin McIntire, deceased, the said administrator *c. t. a.* and the said children in open court appeal to the Court of Appeals of said District, and the penalty of the appeal bond (to act as a supersedeas) is hereby fixed at one hundred dollars.

By the court:

JOB BARNARD, *Justice.*

(Endorsement:) Estate of David McIntire, deceased. Decree overruling exceptions to final account, approving account, allowing cross-appeals & fixing supersedeas bonds, &c. Filed Mar. 21, 1902. Louis A. Dent, register of wills, D. C. Clerk of probate court.

62 Form No. 41.

Supreme Court of the District of Columbia, Holding a Probate Court.

In re Estate of DAVID MCINTIRE, Deceased; Charles McIntire
vs.
EDWIN A. MCINTIRE, Administrator c. t. a. of David McIntire.
} No. 1532, Administration.

Know all men by these presents, that we, Charles McIntire, of Easton, Pennsylvania, as principal, and The American Bonding and Trust Company of Baltimore City, as surety, are held and firmly bound unto the above-named Edwin A. McIntire, administrator c. t. a. of David McIntire in the full sum of one hundred dollars, to be paid to the said Edwin A. McIntire, administrator c. t. a. of David McIntire, his executors, administrators, successors or assigns; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals, and dated this twenty-fifth day of March, in the year of our Lord one thousand nine hundred and two.

Whereas, the above-named Charles McIntire, has prosecuted an appeal to the Court of Appeals of the District of Columbia, to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia on March 21, 1902:

Now, therefore, the condition of this obligation is such, that if the above-named Charles McIntire shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make

good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue in law.

CHARLES McINTIRE. [SEAL.]
THE AMERICAN BONDING & TRUST CO. OF BALTIMORE CITY, [SEAL.]
By L. O. DE LASHMUTT, *Attorney-in-fact.* [SEAL.]

Witness as to Chas. McIntire:
FRANK W. STEWART.

Signed, sealed and delivered in the presence of—
——.

Approved April 9th, 1902.

JOB BARNARD, *Justice.*

(Endorsement:) Estate of David McIntire, deceased. Charles McIntire *vs.* Edwin A. McIntire. Appeal bond. Approved April 9th, 1902. Filed Apr. 9, 1902, Louis A. Dent register of wills, D. C. Clerk of probate court.

[Endorsed:] No. 1532. Administration, guardian. Estate of David McIntire, deceased. Charles McIntire *vs.* Edwin A. McIntire. Appeal bond. Approved April 9th, 1902.

63 Form No. 41.

Supreme Court of the District of Columbia, Holding a Probate Court.

In re Estate of DAVID McINTIRE, Deceased. No. 1532, Administration.

Know all men by these presents, that we, Edwin A. McIntire as administrator, c. t. a. of said estate and in his own right: Martha McIntire, Emma T. McIntire and Elizabeth Test, principals, and Elwood Warner McIntire, surety, are held and firmly bound unto Charles McIntire Jr. in the full sum of one hundred (100) dollars, to be paid to the said Charles McIntire, Jr., his executors, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals, and dated this 17th day of April, in the year of our Lord one thousand nine hundred and two.

Whereas, the above-named Edwin A. McIntire, as administrator c. t. a. of said estate and in his own right: Martha McIntire, Emma T. McIntire and Elizabeth Test have prosecuted an appeal to the Court of Appeals of the District of Columbia, to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is such, that if the above-named Edwin A. McIntire, as administrator as aforesaid and in his own right and Martha McIntire, Emma T. McIntire *Emma T.*

McIntire and Elizabeth Test, shall prosecute their said appeal to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue in law.

EDWIN A. McINTIRE. [SEAL.]
EDWIN A. McINTIRE, [SEAL.]
Adm'r c. t. a. Est. of David McIntire.
MARTHA McINTIRE. [SEAL.]
EMMA T. McINTIRE. [SEAL.]
ELIZABETH M. TEST. [SEAL.]
ELWOOD WARNER McINTIRE. [SEAL.]

Approved April 23d, 1902.

JOB BARNARD, *Justice.*

(Endorsement:) Estate of David McIntire, deceased. E. A. McIntire, adm'n c. t. a. *et al. vs.* Charles McIntire, Jr. Appeal bond. Approved: April 23rd, 1902. Filed, Apr. 23, 1902, Louis A. Dent, register of wills, D. C.. Clerk of probate court.

[Endorsed:] No. 1532. Administration, guardian. Estate of David McIntire, deceased. E. A. McIntire, adm'r c. t. a. *et al. vs.* Charles McIntire, Jr. Appeal bond. Approved: —— —, 1902

64 In the Supreme Court of the District of Columbia, Holding a Probate Court for said District.

In re Estate of DAVID McINTIRE, Deceased. Administration, No. 1532.

Stipulation.

It is hereby stipulated and agreed by and between counsel for the respective parties hereto as follows, to wit:

1st. That Charles McIntire, the brother of David McIntire, had two sons, nephews of the testator David McIntire, to wit, Charles McIntire, the party to these proceedings and Henry McIntire, both of whom were living at the date of the testamentary papers now established in these proceedings as the last will and testament of said David McIntire, namely, January 1 and 7, 1880; and that the said nephew Henry McIntire died in the lifetime of the said David McIntire, namely, on April 21, 1880.

2nd. That at the date of the said testamentary papers, and at the time of his death, the said David McIntire was the owner and holder of five promissory notes of his said brother, Charles McIntire, all dated January 2, 1854, for the aggregate principal sum of $1350.63.

3rd. That at the date of the said testamentary papers as aforesaid, namely, January 1 and 7, 1880, Sarah McIntire, a daughter of Edwin T. McIntire, and a niece of said testator, was living, but she predeceased said testator, David McIntire, having died January 10, 1881.

65 4th. That counsel for the administrator, Edwin A. McIntire, deny the materiality and relevancy of the above facts

and their competency or admissibility as evidence in anywise to show the intent of said testator; but they admit them to be true, reserving all and every right of objection they may have thereto.

5th. That this stipulation, and the following papers only, and none other of the proceedings herein, shall constitute the transcript of record on the cross-appeals herein to the Court of Appeals of the District of Columbia, and on the appeals or cross-appeals from any decision thereon by said Court of Appeals to the Supreme Court of the United States, to wit:

All entries referring to this case in the administration docket of the office of the register of wills.

Affidavit filed with will of said David McIntire.

Will of David McIntire.

Findings of jury, filed January 15, 1891.

Bond of E. A. McIntire, dated April 12, 1884.

Order to pay money and securities into court, filed February 19, 1885.

Award of arbitrators, dated March 31, 1885, including request of Edwin A. McIntire & receipts filed therewith.

Order ratifying award of arbitrators, of April 25, 1885.

Petition of Sarah McIntire, *et al.*, filed March 5, 1886.

Order directing register of wills to deliver assets filed August 13, 1886.

Order admitting will to probate filed February 9, 1891.

Order substituting C. Carlisle as one of the custodians of fund filed December 2, 1892.

Petition of S. S. Henkle to be allowed cou-sel fees filed July 18, 1893.

Order to pay S. S. Henkle $5000. filed July 22, 1893.

Amended order allowing S. S. Henkle counsel fees, filed July 31, 1893.

66 Order substituting Enoch Totten as one of the custodians of assets, filed July 3, 1895.

Petition of Sarah McIntire, *et al.*, for payment of $500 counsel fees to Enoch Totten, filed July 12, 1895.

Order granting said petition, filed July 12, 1895.

Petition of Sarah McIntire, *et al.*, for payment of counsel fees, filed January 28, 1896.

Order on said petition, filed January 28, 1896.

Mandate from the Supreme Court of the United States, filed May 15, 1896.

Petition of Sarah McIntire, *et al.*, for further payment of counsel fees, filed June 1, 1896.

Order thereon filed June 1, 1896.

Report of custodians of fund, filed June 26, 1896.

Order approving custodians' report, filed July 7, 1896.

Order authorizing delivery of assets to administrator, filed July 7, 1896.

Additional bond of E. A. McIntire dated July 9, 1896.

Petition of Martha McIntire, *et al.*, for partial distribution, filed June 2, 1897.

Amended second and final account of E. A. McIntire, filed August 2, 1897.

Approval of second and final account of administrator made March 5th, 1898.

Exceptions to said account filed October 22, 1897.

Order for partial distribution, filed Dec. 9, 1897.

Order overruling said exceptions filed March 5, 1898.

First appeal to Court of Appeals, filed Mar. 10, 1898.

Order fixing security for costs filed March 24, 1898.

Order extending time for filing transcript, filed April 5, 1898.

Order amending order of March 5, 1898, filed May 4, 1898.

Order further extending time for filing transcript filed May 4 1898.

Certified copy of docket entries in suit No. 27815 at law.

Mandate of Court of Appeals, filed.

Affidavit of Edwin A. McIntire filed.

67 Amended second and final account of administrator stated in accordance with mandate of Court of Appeals, filed March 21, 1902.

Exceptions to said account by Charles McIntire, filed March 21, 1902.

Exceptions to said account by Edwin A. McIntire *et al.* filed March 21, 1902.

Order overruling said exceptions, allowing cross-appeal and fixing bond for costs and to act as supersedeas, filed March 21, 1902.

Bond by Charles McIntire.

Bond by Edwin A. McIntire, *et al.*

Certificate of register of wills.

W. G. JOHNSON,
Counsel for Charles McIntire.
DAVIS & TUCKER,
WM. HENRY DENNIS,
Counsel for Edwin A. McIntire, Administrator c. t. a. of the Estate of David McIntire.

(Endorsement:) Estate of David McIntire, deceased. Stipulation, filed, Apr. 23, 1902. Louis A. Dent, register of wills, D. C. Clerk of probate court.

68 Form No. 93.

Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

I, Louis A. Dent, register of wills for the District of Columbia, clerk of the probate court, do hereby certify the foregoing pages, numbered from 1 to 67, inclusive, to be true copies of the originals of certain papers on file in the office of the register of wills, clerk of the probate court, in case No. 1532, doc. 11, estate of David McIn-

tire, deceased, wherein Charles McIntire and Edwin A. McIntire, administrator c. t. a. are cross-appellants, the same constituting a full, true, and correct transcript of record of proceedings had in said cause according to the stipulation of counsel filed therein and made a part hereof.

Seal Supreme Court of the District of Columbia, Probate Jurisdiction.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said probate court, this 29th day of April, A. D. 1902.

LOUIS A. DENT,
Register of Wills for the District of Columbia,
Clerk of the Probate Court.

69 In the Court of Appeals of the District of Columbia.

CHARLES MCINTIRE, Appellant,
vs.
EDWIN A. MCINTIRE, Administrator c. t. a. of David McIntire, Appellee. } No. 1214.

EDWIN A. MCINTIRE, Administrator c. t. a. of David McIntire; Edwin A. McIntire, Martha McIntire, Emma T. McIntire, and Elizabeth M. Test, Appellants,
vs.
CHARLES MCINTIRE, Appellee. } No. 1215.

Now come here the respective appellants in the above-entitled causes, and move the court that the printing of the record in these causes be dispensed with, and that the causes be submitted to the court without argument, and for cause show to the court the stipulation filed herein between the counsel for the respective parties.

W. G. JOHNSON,
Counsel for Charles McIntire.
WILLIAM H. DENNIS,
DAVIS & TUCKER,
Counsel for Edwin A. McIntire, Administrator c. t. a. of David McIntire; Edwin A. McIntire, Martha McIntire, Emma T. McIntire, and Elizabeth M. Test.

(Endorsed:) Nos. 1214 & 1215. Court of Appeals, D. C. April term, 1902. Charles McIntire, appellant, *vs.* Edwin A. McIntire, adm'r c. t. a. &c. and No. 1215. Edwin A. McIntire, adm'r c. t. a. &c. *et al.*, appellants, *vs.* Charles McIntire. Motion to dispense with printing record. Court of Appeals, District of Columbia. Filed May 5, 1902. Robert Willett, clerk.

70 In the Court of Appeals of the District of Columbia.

CHARLES MCINTIRE, Appellant,
vs.
EDWIN A. MCINTIRE, Administrator c. t. a. of David McIntire, Appellee. } No. 1214.

EDWIN A. MCINTIRE, Administrator c. t. a. of David McIntire; Edwin A. McIntire, Martha McIntire, Emma T. McIntire, and Elizabeth M. Test, Appellants,
vs.
CHARLES MCINTIRE, Appellee. } No. 1215.

The decree of the court below, from which the appeals herein are taken, being in accordance with the opinion and mandate of this court on a previous appeal (see McIntire *v.* McIntire 14 D. C. Appeals, 337), it is now stipulated and agreed by and between counsel for the respective parties that, with the consent of the court, the record in these causes need not be printed, but that the respective appellees shall move the court that the decree below be affirmed and that the respective appellants will submit to such motions, such submission, however, not to affect the rights of the respective appellants to appeal to the Supreme Court of the United States from the decree which may be entered herein by this court.

W. G. JOHNSON,
Counsel for Charles McIntire.
WM. HENRY DENNIS,
DAVIS & TUCKER,
Counsel for Edwin A. McIntire, Administrator c. t. a. of David McIntire; Edwin A. McIntire, Martha McIntire, Emma T. McIntire, and Elizabeth M. Test.

(Endorsed:) Nos. 1214 & 1215. Court of Appeals, D. C. April term 1902. Charles McIntire, appellant, *vs.* Edwin A. McIntire, adm'r *c. t. a.* &c. and Edwin A. McIntire, adm'r *c. t. a.* &c., *et al.*, appellants, *vs.* Charles McIntire. Stipulation of counsel to dispense with printing and submission of cases. Court of Appeals, District of Columbia. Filed May 5, 1902. Robert Willett, clerk.

71 WEDNESDAY, *May 7th, A. D.* 1902.

CHARLES MCINTIRE, Appellant,
vs.
EDWIN A. MCINTIRE, Administrator c. t. a. of David McIntire, } No. 1214.

and

EDWIN A. MCINTIRE, Administrator c. t. a. of David McIntire; Edwin A. McIntire, Martha McIntire, Emma T. McIntire, and Elizabeth M. Test, Appellants, } No. 1215.
vs.
CHARLES MCINTIRE.

On motion of counsel for the respective parties, it is ordered by the court that the printing of the record in the above-entitled cause be dispensed with, as per stipulaton of counsel: Whereupon this cause was submitted to the consideration of the court on the transcript of record filed herein.

72 CHARLES MCINTIRE, Appellant,
vs.
EDWIN A. MCINTIRE, Adm'r c. t. a. of David McIntire. } No. 1214.

EDWIN A. MCINTIRE, Adm'r c. t. a. of David McIntire; Edwin A. McIntire, Martha McIntire, Emma T. McIntire, and Elizabeth M. Test, Appellants, } No. 1215.
vs.
CHARLES MCINTIRE.

(Mr. Justice SHEPARD delivered the opinion of the court.)

These are appeals by the opposing parties, respectively, from a final decree settling the account of Edwin A. McIntire, adm'r c. t. a. of David McIntire.

On a former appeal by Charles McIntire all the questions at issue were considered and determined, and the decree now appealed from was entered in direct accordance with the decision then made, as reported in volume 14 Appeal Cases. D. C. p. 337.

For these reasons the parties have entered into a stipulation to the above effect, and moved the court to receive the submission of both appeals on the transcript as certified from the court below, without requiring the same to be printed, and to affirm the said decree as entered. The motion is granted, and because it appears from an inspection of the record that the decree is in complete accord with the mandate and opinion of this court, the decree is in all things affirmed for the reasons given at length in said opinion.

Affirmed.

73 FRIDAY, *May 9th, A. D.* 1902.

CHARLES MCINTIRE, Appellant,
vs.
EDWIN A. MCINTIRE, Administrator c. t. a. of David McIntire, } No. 1214.

and

EDWIN A. MCINTIRE, Administrator c. t. a. of David McIntire; Edwin A. McIntire, Martha McIntire, Emma T. McIntire, and Elizabeth M. Test, Appellants,
vs.
CHARLES MCINTIRE. } No. 1215.

} April Term, 1902.

Appeals from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia on appeal and cross-appeal, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court, in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

May 9, 1902.

74 TUESDAY, *May 20th, A. D.* 1902.

CHARLES MCINTIRE, Appellant,
vs.
EDWIN A. MCINTIRE, Administrator c. t. a. of David McIntire. } No. 1214.

On motion of Mr. William G. Johnson of counsel for Charles McIntire, it is ordered by the court that an appeal and writ of error to remove this cause to the Supreme Court of the United States be, and the same are hereby, allowed, and bond on said appeal and writ of error is hereby fixed at the sum of one hundred dollars, the same to act as a supersedeas.

75 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Charles McIntire, appellant and Edwin A. McIntire, administrator *c. t. a.* of David McIntire, appellee a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do

command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of May, in the year of our Lord one thousand nine hundred and two.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

76 TUESDAY, *May 20th, A. D.* 1902.

EDWIN A. MCINTIRE, Administrator c. t. a. David McIntire; Edwin A. McIntire, Martha McIntire, Emma T. McIntire, and Elizabeth M. Test, Appellants,
vs.
CHARLES MCINTIRE. } No. 1215.

On motion of Mr. William H. Dennis of counsel for Edwin A. McIntire, administrator c. t. a. of David McIntire, Edwin A. McIntire, Martha McIntire, Emma T. McIntire, and Elizabeth M. Test, it is ordered by the court that an appeal and writ of error to remove this cause to the Supreme Court of the United States, be, and the same are hereby, allowed, and bond on said appeal and writ of error is hereby fixed at the sum of one hundred dollars, the same to act as a supersedeas.

77 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Edwin A. McIntire, administrator c. t. a. of David McIntire, Edwin A. McIntire, Martha McIntire, Emma T. McIntire, and Elizabeth M. Test, appellants, and Charles McIntire, appellee, a manifest error hath happened, to the great damage of the said appellants, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washing-

ton, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of May, in the year of our Lord one thousand nine hundred and two.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

78 Know all men by these presents, that we Charles McIntire as principal, and The American Bonding and Trust Company of Baltimore City, as surety, are held and firmly bound unto Edwin A. McIntire, administrator c. t. a. of David McIntire, in the full and just sum of one hundred dollars, to be paid to the said Edwin A. McIntire administrator c. t. a. of David McIntire and his successors in said trust, — well and truly to be made we bind ourselves and our respective heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this twenty-eighth day of May, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court between the said Charles McIntire and the said Edwin A. McIntire administrator c. t. a. of David McIntire a decree was rendered against the said Charles McIntire, and he has prayed and obtained an appeal to the Supreme Court of the United States and has also obtained a writ of error and filed a copy thereof in the clerk's office of said Court of Appeals, to reverse the decree in the aforesaid suit, and a citation directed to the said Edwin A. McIntire administrator c. t. a. of David McIntire citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now the condition of the above obligation is such, that if the said Charles McIntire shall prosecute said appeal and writ of error to effect and answer all damages and costs if he fail to make his
79 plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES McINTIRE. [SEAL.]
THE AMERICAN BONDING & TRUST COMPANY OF BALTIMORE CITY,
By L. O. DE LASHMUT, *Attorney-in-fact.*

[Seal of American Bonding & Trust Company of Baltimore City.]

Sealed and delivered in presence of—
FRANK W. STEWART.
BYRON W. HERST.

Approved June 18, 1902, by—
R. H. ALVEY,
Chief Justice Court of Appeals of the District of Columbia.

Endorsed: No. 1214. Charles McIntire, appellant, vs. Edwin A. McIntire, adm'r c. t. a. of David McIntire. Bond on appeal and writ of error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jun- 19, 1902. Robert Willett, clerk.

80 UNITED STATES OF AMERICA, ss:

To Edwin A. McIntire, administrator c. t. a. of David McIntire, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Charles McIntire is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 19th day of June, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged this 21st day of June, 1902.

WM. HENRY DENNIS,
For Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun- 24 1902 Robert Willett clerk

81 UNITED STATES OF AMERICA, ss:

To Edwin A. McIntire, administrator c. t. a. of David McIntire, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Charles McIntire is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 19th day of June, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged this 21st day of June 1902.

WM. HENRY DENNIS,
For Defendant in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun. 24 1902 Robert Willett clerk

82 (*Bond on Appeal and Writ of Error.*)

Know all men by these presents, that we Edwin A. McIntire, administrator c. t. a. of David McIntire, Edwin A. McIntire, Martha McIntire, Emma T. McIntire and Elizabeth M. Test, as principals, and Elwood Warner McIntire as surety are held and firmly bound unto Charles McIntire in the full and just sum of one hundred dollars, to be paid to the said Charles McIntire, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this tenth (10th) day of June in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court between the above-named principals in this bond and said Charles McIntire, a decree was rendered against the said principals in this bond, and they have prayed and obtained and appeal to the Supreme Court of the United States and have also obtained a writ of error and filed a copy thereof in the clerk's office of the said Court of Appeals, to reverse the decree in the aforesaid suit, and a citation directed to the said Charles McIntire citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the said Edwin A. McIntire, administrator c. t. a. of David McIntire, Edwin A. McIntire, Martha McIntire, Emma T. McIntire, and Elizabeth M. Test shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

83

EDWIN A. McINTIRE, [SEAL.]
Administrator c. t. a.
EDWIN A. McINTIRE. [SEAL.]
MARTHA McINTIRE. [SEAL.]
EMMA T. McINTIRE. [SEAL.]
ELIZABETH M. TEST. [SEAL.]
ELWOOD WARNER McINTIRE. [SEAL.]

Sealed and delivered in the presence of—
A. GREEN.

Approved by—
R. H. ALVEY,
Chief Justice Court of Appeals of the District of Columbia.

(Endorsed:) No. 1215. Edwin A. McIntire, adm'r c. t. a. of David McIntire, *et al.* appellants, *vs.* Charles McIntire. Bond on appeal and writ of error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jun- 21, 1902. Robert Willett, clerk.

84 UNITED STATES OF AMERICA, *ss:*

To Charles McIntire, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Edwin A. McIntire, administrator, c. t. a. of David McIntire, Edwin A. McIntire, Martha McIntire, Emma T. McIntire, and Elizabeth M. Test are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 21st day of June, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged this 21st day of June, 1902.
W. G. JOHNSON,
For Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun-23 1902. Robert Willett, clerk.

85 UNITED STATES OF AMERICA, *ss:*

To Charles McIntire, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Edwin A. McIntire, administrator, c. t. a. of David McIntire, Edwin A. McIntire, Martha McIntire, Emma T. McIntire, and Elizabeth M. Test, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 21st day of June, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged this 21st day of June, 1902.
W. G. JOHNSON,
For Defendant in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun-23 1902. Robert Willett, clerk.

86 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing is a true and complete transcript of the record and all proceedings in said Court of Appeals in the case of Charles McIntire, appellant, *vs.* Edwin A. McIntire, administrator c. t. a. of David McIntire, and Edwin A. McIntire, administrator c. t. a. of David McIntire, Edwin A. McIntire, Martha McIntire, Emma T. McIntire, and Elizabeth M. Test, appellants, *vs.* Charles McIntire, Nos. 1214 & 1215, April term, 1902, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 30th day of June A. D. 1902.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

87 In the Supreme Court of the United States, October Term, 1902.

CHARLES MCINTIRE
vs.
EDWIN A. MCINTIRE. } No. 376.

EDWIN A. MCINTIRE ET AL.
vs.
CHARLES MCINTIRE. } No. 377.

It is hereby stipulated and agreed by and between all the parties to the above-entitled causes that the opinion of the Court of Appeals of the District of Columbia in the case of McIntire *vs.* McIntire, rendered February 28, 1899, a copy of which opinion is hereto annexed, may be printed as an appendix to the record in these causes.

WM. G. JOHNSON,
Counsel for Charles McIntire.
WM. HENRY DENNIS,
HENRY E. DAVIS,
CHAS. COWLES TUCKER,
Counsel for Edwin A. McIntire et al.

88 Court of Appeals of the District of Columbia.

14 App. D. C., 337.

CHARLES MCINTIRE, JR., Appellant,
v.
EDWIN A. MCINTIRE, Adm'r c. t. a. of David McIntire, Deceased.

Mr. Justice SHEPARD delivered the opinion of the court:

This is an appeal from an order of the supreme court of the District, holding a special term for orphans' court business, passing and

approving the final account of Edwin A. McIntire, administrator of the estate of David McIntire, deceased, and directing distribution in accordance therewith.

David McIntire died April 1, 1884, in the District of Columbia, leaving a will making certain bequests, but naming no executor.

The clauses of that will, that have any relation to the matters in controversy, are the following:

"This my *last will* and testament.

"I David McIntire. tin-plate worker, of this city [of]* d. will, bequeath, or devise, to my nephews, and nieces, that is to say, from July the first. 1st eighteen hundred and fifty-four, 1854

"To the opening of. or reading of this, paper. one thousand three hundred and fifty dollars and sixty-four cents ($1,350.64) is to be calculated at six 6 per cent. interest

"That amount whatever it may be is to be given to each of my brother Edwin's children. The remainder if any, is to be equally divided between my brothers Edwin and Charles children."

The brother Charles referred to in the foregoing, was living at the time of the testator's death. He had one child, Charles McIntire, Jr., who is the appellant in this proceeding. The brother Edwin died before the testator, leaving five children, namely, Edwin A., Martha, Adaline, Emma T. McIntire and Elizabeth Test.

A petition for probate of the will was filed by Martha McIntire, and probate was had April 12, 1884. On the same day, at the request of his sisters, Edwin A. McIntire was appointed administrator with the will annexed, and gave a bond in the sum of $8,000, with two of his sisters as sureties.

The inventory returned by the administrator, January 26, 1885, showed an estate in cash and securities amounting to $47,987.20. A controversy arose between Charles McIntire, Jr., and Edwin A. McIntire in respect of the sum of $10,000 cash alleged to have been received by the latter and omitted from the inventory, which was settled by an order made February 19, 1885, the administrator and all the legatees expressly consenting thereto.

This decree provides:

1. That Edwin A. McIntire shall act as administrator of said David McIntire, but without any allowance for commission or other charge for his services as such administrator.

2. After reciting the controversy, that the same be referred to the arbitration of Campbell G. Berryman, James M. Johnston and James G. Payne or any two of them, with direction to hear all the proofs and make a decision and return the same into court; "and if the said decision shall find that the said Edwin A. McIntire has received or ought to account for the said sum of $10,000, thereupon it is ordered that the entire share of the said Edwin A. McIntire, as legatee and distributee in the whole estate of said David McIntire, or so much thereof as may be necessary, shall be retained, appropriated, and applied by this court to the payment to the said estate of said sum of $10,000, and interest thereon from the time when the same was found by said arbitrators to have been received by him, or from which he was accountable to said estate for the same; and if the

said share should be found insufficient to pay the said sum of $10,000 in full, and any interest thereon, as aforesaid, then the said Edwin A. McIntire shall forthwith pay into this court, in cash, the additional sum necessary to make up any such deficiency.

"3. And it is further ordered that if for any reason it shall appear to this court that the said share of the said Edwin A. McIntire, as distributee and legatee of the said estate, may not be applicable to the payment of said sum of $10,000 and interest, as aforesaid, in whole, as above mentioned, or that for any reason the said indebtedness to be found, as aforesaid, cannot be set off against his said share in said estate, then it is ordered that the said Edwin A. McIntire shall thereupon at once pay the said sum of $10,000 and interest thereon, as aforesaid, into this court.

"4. It is further ordered that the said assets of the said estate shall remain under the control of this court until the final settlement of the said estate, and that any other or further assets of said estate that may be discovered shall be paid over to this court."

On February 25, 1885, the said Edwin A. McIntire presented a communication in writing to the said arbitrators agreeing and requesting them to return an award against him showing that he had received the said sum of $10,000 on April 18, 1884.

He presented therewith the several receipts of Emma T., Martha, and Adaline McIntire, and Elizabeth Test, for the sum of $2,500 each, on account of their shares in the estate. The arbitrators made a formal report declaring that Edwin A. McIntire, as administrator of David McIntire, on April 18, 1884, received the sum of $10,000 in addition to the stocks, bonds and cash returned by him; and that he ought to account as administrator for the said sum in accordance with the order of reference aforesaid. This report of final award was, by order duly entered with the consent of all the parties, confirmed April 25, 1885.

In June, 1885, Charles McIntire, brother of the testator, filed a petition to set aside the order probating the will, and for issues to be transmittted to the circuit court for trial by jury. After considerable delay, these issues were tried and resulted in a judgment sustaining the will. This was appealed first to the general term and thence to the Supreme Court of the United States, where it was affirmed April 13, 1896. See McIntire v. McIntire, 162 U. S. 383.

Whilst the cash and securities of the estate remained in the possession of the register of wills in accordance with the order before referred to, and on March 5, 1886, the court ordered the register to pay S. S. Henkle the sum of $500, to be charged to the distributive shares of Edwin A. McIntire and his sisters aforesaid. The petition for this order was signed by each of them and represented that they had employed General Henkle as their counsel to represent them in sustaining said will.

On August 13, 1886, by consent of all parties, an order was made directing the register of wills to deliver all of the cash and securities of the estate to the solicitors of the parties respectively—S. S. Henkle and James M. Johnston—to be held by them, subject to the order of the court uhtil the final settlement of all litigation.

On December 2, 1892, James M. Johnston by consent retired and Calderon Carlisle was appointed to succeed him.

On July 22, 1893, upon a petition of Edwin A., Sarah, Martha and Emma T. McIntire, and Elizabeth Test, representing that S. S. Henkle had been retained by them to defend the will in the contest begun by Chas. McIntire, Senior, an order was entered requiring the custodians of the funds of the estate to pay to said S. S. Henkle the sum of $5,000 on account of counsel fees in said litigation.

This order recited that the said sum "be charged against the interest of the said Edwin A., Sarah, Martha, and Emma T. McIntire, and Elizabeth Test, in said estate, without prejudice, however, to the right of the said-named legatees or the administrator *c. t. a.* to apply to this court at the termination of the litigation touching the validity of the will of the said David McIntire, to have said allowance charged against the estate of the said testator."

S. S. Henkle dying on May 21, 1895, was succeeded by Enoch Totten, by order duly made July 3, 1895.

On application similar to those made on behalf of S. S. Henkle, orders were made for the payment to Enoch Totten of fees on the same account as follows: July 12, 1895, $500; January 28, 1896, $1,000; and on June 1, 1896, $5,000. The orders for these payments followed the form above quoted in the order to pay $5,000 to S. S. Henkle.

On July 26, 1896, Carlisle and Totten returned into court a complete account of their administration, in which the foregoing disbursements on account of fees, and others on account of costs, were credited. This was passed by the court by order duly entered, and they were allowed a commission of 5 per cent. on the cash coming into their hands and 5 per cent. on the cash value of the stocks and securities held by them. During their administration they had made certain investments of the cash received as dividends upon the stock and securities, by direction of the court.

On July 7, 1897, Edwin A. McIntire upon leave granted by the court, gave a new bond as administrator in the sum of $100,000, and the assets of the estate were ordered to be delivered to him.

On August 2, 1897, the said administrator filed his final account and scheme for distribution of the estate among the legatees, to which exceptions were filed by the appellant.

All of the exceptions were overruled and the account approved and distribution ordered; and from that order this appeal has been prosecuted. By agreement a partial distribution was had, leaving, however, funds sufficient to meet any change that might be made in the event the exceptions should be sustained on appeal.

1. The first exception to the account is on the failure of the administrator to charge himself with interest on the $10,000 found by the award to have come into his hands April 18, 1884. We are of opinion that this exception should have been sustained.

The administrator confessed the receipt of the money on that date, and the decree referring the matter to arbitration, to which he consented, expressly provided that interest should be charged from the date of receipt. These $10,000 were not paid into court with the

remaining money of the estate, but, as we have seen, were represented as divided between the four sisters of the administrator on account of their shares in the estate under the will, according to their several receipts dated February 25, 1885. The arbitrators to whom these receipts were exhibited had nothing to do with the collection of the fund reported by them as due the estate. No order for its distribution was ever made and nothing entered of record that indicates an approval of the action of the administrator.

But as the validity of the will had not then been contested, and the distributees were all special and residuary legatees and entitled to far more than the amounts so paid them, there would seem to be no reason why the administrator should not be credited with the payments so made to them and as of that date. Notwithstanding the extraordinary proceedings through which, with his own express consent, he had been deprived of the actual custody and administration of the assets of the estate, as well as the insufficient bond that he had first given, he was still administrator of the estate in name by the recognition of the court. He should therefore be charged with interest on the said $10,000 from April 18, 1884, to February 25, 1885, at the legal rate of six per cent. per annum.

The four legatees who received equal shares of the $10,000, according to their receipts, should be charged with the same, as of that date, as credits upon their respective legacies; but not as residuary legatees as has been contended on their behalf. That would be unjust to the remaining residuary legatees. The special legacies to these four persons, and their brother, the administrator, bear interest after one year from the death of the testator, and it is right that those who received the payments should have them charged to that account. In the absence of any order for the distribution of the fund in any other way the presumption ought to be that it was on account of the interest-bearing legacies which are the first charge upon the estate in the hands of the administrator.

In restating the account the said payments will be credited upon the special legacies of the payees as of the date of receipt; and the interest due by the administrator upon the said $10,000 will be charged against his special legacy also, as of the same date.

2. The second exception relates to the attorneys' fees that were paid out of the funds of the estate, to Messrs. Henkle and Totten, in obedience to the orders hereinabove mentioned. No doubt, as contended on behalf of the appellant, the regular order of proceeding therein should have been an application filed, under the leave given in the last four of said orders, to charge the said sums against the estate.

No such application was made, and the administrator began his account with the assets of the estate as turned over to him by the *quasi* receivers when relieved of their trust.

Thereby, without change in the orders charging those disbursements to the special legatees, they were transferred to the estate. Considering, however, the want of technical formality that must, from their nature, naturally prevail in such proceedings in the orphans' court, together with the fact that opportunity was given to

present exceptions to the account, on that ground as well as others, the final order approving the account and ordering distribution should be regarded as amending or vacating the former orders.

There can be doubt under the probate act of 1798, that, after a will has been admitted to probate, it is the duty of the executor to appear to a caveat filed against it, and make defense on behalf of those interested in the will; and, necessarily, he is entitled to a reasonable allowance for attorneys' charges incurred therein. Act of 1798, ch. 101, subch. 10, sec. 2; Compton *v.* Barnes, 4 Gill, 55; Glass *v.* Ramsey, 9 Gill, 456; Townshend *v.* Brock, 9 Gill, 90, 92; Gorton *v.* Perkins, 63 Md. 589, 590.

We can see no reason why the same rule should not be made to apply, in this case, to the administrator with the will annexed. He was appointed to execute the will because the testator neglected to name an executor. All the duties of an executor devolved upon him in the administration of the estate under the will. The interests of all the parties to the controversy, as legatees, depended upon the final establishment of the will, and it became the duty of the administrator to defend it when assailed. There is nothing in the record to show that the fees charged against the estate were excessive or unreasonable, and hence the court did not err in overruling the exceptions in respect of the second payment to S. S. Henkle and the three payments to Enoch Totten on account of their services in the contest of the will.

The first payment to S. S. Henkle of $500, made March 6, 1886, appears in a different light. This money was ordered paid upon the petition of the special legatees, wherein they recited their special interests under the will and in the contest of the same, and that they had retained S. S. Henkle "who for some months past has been managing their interests."

The order directed the payment to be made and charged to the distributive shares of the petitioners. There was no leave given in the order to move subsequently to have the payment charged to the estate. This item seems to have been overlooked in the settlement of the account. It is not included in the account of the special custodians of the fund, because the disbursement was made from the funds in the registry of the court before their appointment. In restating the account this item should be brought in and charged to the said special legatees as provided in the order for its payment.

3. The third exception is taken to the commissions claimed by, and allowed to, the administrator in settling his final account. These it is conceded amount to more than five per cent. of the cash value of the assets of the estate. Under any view of the question the allowance of more than five per cent. was error.

The statute limits the commissions that may be allowed an administrator to ten per cent. Now, as a commission of five per cent. has been allowed and paid to the *quasi* receivers, that amount must be reckoned in any allowance subsequently made to the administrator. It is not to be treated as an independent allowance to regu-

larly appointed collectors of the estate, as was the case in Wilson v. Wilson, 3 G. & J. 20. Grant that there was no authority of law for surrendering the assets of the estate to those receivers for administration, but as the administrator consented thereto, and to the allowance made to them for the performance of his duties, he cannot now deny that the commission was paid to them as his representatives, in the course of the administration of the estate.

Under ordinary circumstances, the allowance of commissions to an administrator, within the statutory limits, is a matter of discretion with the orphans' court, the exercise of which will not be reviewed. Sinnott *v.* Kenaday, 27 Wash. Law Rep. 82, 87; Nichols *v.* Hodges, 1 Pet. 562. There are special circumstances in this case, however, sufficient to create an exception to the foregoing rule. At the very beginning of his administration, as we have seen, the administrator, by his own consent, was shorn of all actual responsibility for the collection and preservation of the estate. It is true that he was allowed by the same order to continue "to act as administrator;" but upon the express condition that this should be "without allowance for commission or other charge for his services as such administrator." It is contended, on behalf of the administrator, that a contract or agreement of an administrator to act without charge for his services is without consideration as well as against public policy, and therefore not enforceable. Apparently the consideration in this case was the empty title of administrator that was permitted to be retained through this extraordinary proceeding.

Having expressly agreed to relinquish all claim to commissions as the price of this equivocal recognition, we think that he ought not now to be allowed to deny the obligation of that relinquishment. The cases cited on behalf of the administrator do not support his contention. Eversfield *v.* Eversfield, 4 H. & J. 12; Richardson *v.* Stansbury, 4 H. & J. 275. Doubtless there may be circumstances under which a declaration that no commissions would be demanded by an administrator, would not be regarded as binding; but they do not exist in this case. In Eversfield *v.* Eversfield, *supra*, there was no agreement that commissions would not be demanded. At the time of procuring certain allowances for expenses, the executrix stated that she would not make a claim for commissions; but no such condition was imposed in the order therefor, and it was held that she was not bound by the declaration. In Richardson *v.* Stansbury, *supra*, there were two executors, but one of them had the entire management of the estate. He refused to divide the commissions allowed by the court with his coexecutor, who thereupon sued him, and was permitted to recover his portion. In commenting upon that case it was afterwards said, that had there been an agreement between the executors that one might retain the commissions in consideration of his exclusive management of the estate, it would have been upheld. Brown *v.* Stewart, 4 Md. Ch. 368, 371; see, also, McKim *v.* Duncan, 4 Gill, at page 85.

Again, all that remained to be done when the assets were redelivered to the administrator, was to settle the final account and pro-

cure an order of distribution. The litigation over the will had ended in its establishment. The labor and responsibility of administration were practically ended. And it is apparent that the full recognition of the administrator was for the purpose of closing the administration by distribution.

4. Three of the special exceptions have been argued together, as they relate to the construction of the will in making the distribution of the estate among the special and residuary legatees.

(1.) The first point made is that the orphans' court has no jurisdiction beyond the probate of a will and the distribution of the estate when no construction of the will is required therefor. As the will in this case requires interpretation, in order to determine the respective interests of the legatees which are in dispute, the contention is that resort must be had to a court of equity. In this view we cannot concur. Undoubtedly the orphans' court has but a limited jurisdiction in matters of probate and administration, and is not a court of construction. But it is expressly vested with jurisdiction "for the purpose of * * * directing the conduct and settling the accounts of executors and administrators, securing the rights of legatees, superintending the distribution of the estates of intestates, securing the rights of orphans and legatees, and administering justice in all matters relating to the affairs of deceased persons according to law." Chap. 101, subch. 15, sec. 1. Other sections provide for calling together distributees and legatees, and section 12 provides: "The orphans' court shall have full power, authority and jurisdiction to examine hear and decree upon all accounts, claims, and demands, existing between wards and their guardians, and between legatees, or persons entitled to any distributable part of an intestate's estate, and executors and administrators, and may enforce obedience to, and execution of, their decrees in the same ample manner as a court of chancery may."

The power to make settlements, secure legatees and order distribution of the estate must include, by necessary implication, the power to construe the provisions of the will in so doing. McLane *v.* Cropper, 5 App. D. C. 276, 292; Sinnott *v.* Kenaday, 12 App. D. C. 115, 121; and cases cited.

Whether an order so made may be subsequently reviewed by a proceeding in a court of general jurisdiction, is a question that we are not now called upon to decide.

(2.) In construing the clause of the will giving to the children of the testator's brother Edwin the sum of $1,360.64, with interest calculated at six per cent. per annum from July 1, 1854, to the date of the testator's death, the court was clearly right. The terms of the will are plain and admit of no doubt. The bequest is to each of them and is a first charge upon the fund.

(3.) It seems equally clear also that the court did not err in the construction of the residuary clause of the will. The provision that the residue of the estate "be equally divided between my brothers Edwin and Charles' children," can only be satisfied by a division *per capita*. The children of Edwin and Charles are not divided into

classes, but made one. Maddox *v.* State, 4 H. & J. 539; Britton *v.* Carson, 46 Md. 186. In the first of those cases the bequest was: "to be equally divided between my brother Justinian and my brother George's children." In the second it read: "shall be equally divided between my said daughter and the children of Virginia Carson." In both the distribution was ordered to be made *per capita*. See, also, Benson *v.* Wright, 4 Md. Ch. 278; Allender *v.* Kepler, 62 Md. 7.

5. Under the next exception in order, it appears that whilst the assets were in the hands of the attorneys, an order was made authorizing a loan of $5,000 to Charles C. Duncanson. His note was taken for that sum with six per cent. interest payable semi-annually, and secured by a deed of trust. This note passed into the possession of the administrator with the other securities of the estate. In his final settlement he has failed to account for one or more installments of interest accruing due prior to the order therefor. As there is nothing in the record by which it can be determined that this interest had or could have been collected, it is sufficient to say that, in restating the account, the administrator should be charged with the several instalments of interest unless it be made to appear that they could not be collected by the use of reasonable diligence.

6. The last exception for consideration was taken to the omission of the administrator to charge himself with interest upon the sum of $1,419.73 shown by the account to have come into his hands on or before February 27, 1891.

It appears that the administrator received from the Pennsylvania Railway Company in July, 1889, certain stock therein that had been issued as a dividend upon stock held by the testator. The money aforesaid consisted of cash dividends collected upon that stock. Neither this additional stock nor the cash dividends collected thereon had been delivered by him to the then custodians of the estate as required by the order. Had this money been turned over to them it might have been invested along with other funds under the direction of the court. It remained, however, in the possession of the administrator and subject to his private use, for there is nothing to show its use, or reservation for the probable needs of the estate.

If it be not shown that the money was used or kept for the necessary benefit of the estate, the administrator should be charged with interest upon it; or it may be applied as a credit upon his special legacy as of the date of its receipt by him.

For the reasons given, the order appealed from will be reversed, with costs to be charged to the estate, and the cause remanded for further proceedings in settlement of the account and final distribution, not inconsistent with this decision. It is so ordered.

Reversed.

[Endorsed:] File Nos. 18604 & 18605. Supreme Court U. S. October term, 1902. Term No. 376. Chas. McIntire, app't & P. E. *vs.* Edwin A. McIntire, adm'r and No. 377, Edwin A. McIntire, adm'r,

et al. app'ts & P. E. *vs.* Chas. McIntire. Stipulation for addition to record. Filed July 14, 1902.

Endorsed on cover: File Nos. 18604 and 18605. District of Columbia Court of Appeals. Term No. 376. Charles McIntire, appellant & P. E., *vs.* Edwin A. McIntire, administrator c. t. a. of David McIntire. Term No. 377. Edwin A. McIntire, administrator c. t. a. of David McIntire; Edwin A. McIntire, Martha McIntire, Emma T. McIntire and Elizabeth M. Test, app'ts & P. E., *vs.* Charles McIntire. Filed July 12, 1902.

FILE COPY.

FILED
NOV 13 1903
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 84.

CHARLES McINTIRE, APPELLANT AND PLAINTIFF IN ERROR,

vs.

EDWIN A. McINTIRE, ADMINISTRATOR C. T. A. OF DAVID McINTIRE.

No. 85.

EDWIN A. McMcINTIRE, ADMINISTRATOR C. T. A. OF DAVID McINTIRE ET AL., APPELLANTS AND PLAINTIFFS IN ERROR,

vs.

CHARLES McINTIRE.

BRIEF FOR CHARLES McINTIRE.

WM. G. JOHNSON,
Counsel for Charles McIntire.

THE LAW REPORTER COMPANY, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 84.

CHARLES McINTIRE, APPELLANT AND PLAINTIFF IN ERROR,

vs.

EDWIN A. McINTIRE, ADMINISTRATOR C. T. A. OF DAVID McINTIRE.

No. 85.

EDWIN A. McMcINTIRE, ADMINISTRATOR C. T. A. OF DAVID McINTIRE ET AL., APPELLANTS AND PLAINTIFFS IN ERROR,

vs.

CHARLES McINTIRE.

BRIEF FOR CHARLES McINTIRE.

Statement of the Case.

These causes are brought to this court by cross appeals from and writs of error to the Court of Appeals of the District of Columbia (Rec. pp. 62–63) to review the judgment of that court (Rec. p. 62) affirming the judgment of the Supreme Court of the District of Columbia (Rec. pp. 53–54) overruling exceptions taken by Charles McIntire (Rec. p. 52) and by Edwin A. McIntire, administrator c. t. a. of David

McIntire (Rec. pp. 52–53) to the second account of Edwin A. McIntire as such administrator c. t. a. (Rec. pp. 46–51).

A previous account had been filed by the administrator (Rec. pp. 34–36) to which exceptions were filed by Charles McIntire (Rec. pp. 36–38), all of which exceptions were overruled by the Supreme Court of the District of Columbia (Rec. p. 39). From this order an appeal was taken by Charles McIntire to the Court of Appeals (Rec. p. 40), and the judgment of the said Supreme Court overruling the said exceptions was reversed by the Court of Appeals (Rec. p. 44) and the cause remanded to the Supreme Court of the District of Columbia to restate the account of the administrator in accordance with the opinion of the Court of Appeals (Rec. pp. 68–76).

Upon said remanding of the cause to the Supreme Court of the District of Columbia the account now in controversy (Rec. pp. 47–51) was stated in accordance with the mandate and opinion of the Court of Appeals, to which Charles McIntire and the administrator c. t. a. both filed exceptions as before stated (Rec. pp. 52–53), which were overruled Rec. pp. 53–54), the account approved and passed, and the administrator c. t. a. directed to make distribution of the estate in accordance therewith (Rec. pp. 53–54). This last and final judgment was affirmed by the Court of Appeals upon the grounds stated in its opinion on the first appeal (Rec. pp. 61, 68–76).

The appellant and plaintiff in error, Charles McIntire, excepted to the account because (1) the distribution of the residuum was made among all the children of the two brothers of the testator *per capita* instead of between the two sets of children *per stirpes*, and also because (2) the children of Edwin T. McIntire were not charged with the sum of $11,000 paid to their counsel during litigation (Rec. p. 52).

The residuum, as shown by the account, amounts to $61,483.20 (Rec. p. 50), of which there is distributed to this appellant and plaintiff in error in the *per capita* distribution

one-sixth, or $10,247.20 (Rec. p. 50), instead of one-half under a *per stirpes* distribution as claimed in his exception (Rec. p. 52).

The facts out of which this controversy arises are few and simple.

David McIntire, the testator, a bachelor, died on the 1st of April, 1894, leaving a brother, Charles McIntire, sr., and five children of a predeceased brother, Edwin T. McIntire, as his next of kin, and leaving a large personal estate.

The will as probated is in two parts (Rec. pp. 6–7), and dated, respectively, January 7, 1880, and January 1, 1880. The question of construction arises upon the terms of the paper dated January 7, 1880 (Rec. p. 6), which is expressed in the following language:

> "This my last will and testament.
>
> "I David McIntire. tin-plate worker, of this city of do will, bequeath, or devise, to my nephews, and nieces, that is to say, from July the first. 1st eighteen hundred and fifty-four. 1854
>
> "To the opening of. or reading of this, paper. one thousand three hundred and fifty dollars and sixty-four cents ($1,350.64) is to be calculated at six 6 per cent. interest
>
> "That amount whatever it may be is to be given to each of my Brother Edwin's children. The remainder if any, is to be equally divided between my brothers Edwin and Charles children."

At the date of this paper the testator's brother, Charles, was living, and had two sons, Charles and Henry, the latter dying before the testator, on April 21, 1880 (Rec. p. 56).

The testator's brother Edwin was dead at the date of this paper, leaving six children, viz: Edwin A. McIntire, Martha McIntire, Emma T. McIntire, Elizabeth M. Test, Adaline McIntire, and Sarah McIntire. Sarah predeceased the testator on January 10, 1881 (Rec. p. 56).

At the date of the will and at the time of his death the

testator, David McIntire, was the owner and holder of five promissory notes of his brother Charles McIntire, all dated January 2, 1854, and amounting in the aggregate to the principal sum of $1,350.63 (Rec. p. 56).

The will was filed on the 8th of April, 1884, and admitted to probate on the 12th of the same month. The will names no executor and letters of administration with the will annexed were issued on said 12th of April to Edwin A. McIntire (Rec. p. 1) upon a bond of only $8,000 (Rec. pp. 8–9).

The law required an inventory to be filed within ninety days after the granting of letters, but none was filed until January 26, 1885 (Rec. p. 1), which alleged an estate of $47,987.20.

In February, 1885, litigation respecting the conduct of Edwin A. McIntire, administrator c. t. a., growing out of the fraudulent concealment by him of $10,000 belonging to the estate, was prosecuted, as shown by the transcript of the proceedings (Rec. pp. 1, 5, 9, 14), As a consequence of this litigation the administrator was required to deliver all the assets of the estate to custodians appointed by the court (Rec. pp. 10, 11, 15, 16, 17, 20), who cared for and administered the estate from the 19th of February, 1885, until the 7th of July, 1896, when they were directed to turn over the assets to the administrator c. t. a. upon his filing bond in the sum of $100,000 (Rec. p. 31).

On the 5th of June, 1885, Charles McIntire, sr., the brother of the decedent, filed a caveat to the will. Pending those proceedings Charles McIntire, sr., died, and the present appellant and plaintiff in error was substituted in his place on November 20, 1890 (Rec. p. 43). On January 15, 1891, a verdict was rendered sustaining the will (Rec. pp. 7, 8), and the judgment thereon was affirmed by this court in the case of McIntire *vs.* McIntire, 162 U. S., p. 383.

In the course of the litigation the custodians of the estate

paid to the counsel of Edwin A. McIntire and his sisters, upon their petition and by orders of the court, various sums aggregating $12,000 as counsel fees (Rec. pp. 15, 18, 19, 20–22, 23, 25, 26). It is claimed by the appellant and plaintiff in error, Charles McIntire, that these payments should be charged as a distribution to the legatees, upon whose petition and to whose counsel they were paid, and not out of the estate generally, thus diminishing the resdiuum and the action of the court, overruling this objection, was the subject of his exception to the account (Rec. p. 52).

It is thus seen that upon this appeal and writ of error but two questions are presented, namely (1) the proper construction of the residuary clause of the will, and (2) the propriety of allowing, out of the estate, counsel fees paid to the counsel of five of the principal legatees under the will.

Assignment of Errors.

1. The court erred in adjudging that under the residuary clause of the will the residue of the estate should be distributed among all the children of the testator's two brothers *per capita*.

2. The court erred in not adjudging that under the residuary clause of the will, the appellant and plaintiff in error, Charles McIntire, was entitled to one half of the net residue of the estate.

3. The court erred in adjudging that the counsel fees paid to the counsel of the legatees should not be charged against their distributive shares in the estate and in adjudging that the same be charged against the estate in diminution of the general residue.

4. The court erred in overruling the first exception of Charles McIntire to the account.

5. The court erred in overruling the second exception of Charles McIntire to the account.

ARGUMENT.

The First, Second, and Fifth Errors Assigned.

The question raised by these assignments of error is as to the correct interpretation of the residuary clause of the will, which is expressed in very few words, thus: "The remainder, if any, is to be equally divided between my brothers Edwin and Charles children."

By this language did the testator intend to mass together all the children of both brothers or did he intend to separate them into two classes, distinguished and identified by their respective fathers?

The intent of the testator is to be ascertained from an examination of the whole instrument and also in the light of the surrounding facts and circumstances existing at the time of its execution.

It is submitted that there is inherent evidence in these testamentary papers of the testator's capacity to designate the beneficiaries under his will individually and in classes when such was his purpose.

In the curious paper dated January 1, 1880 (Rec. pp. 6–7), after a somewhat solemn introduction, the testator bequeaths his clothing to those that they fit, but in respect of this trifling bequest he directs that a rough estimate is to be made and the articles divided, "*nephews first.*"

Here he makes no separation between the children of his two bothers except one of sex.

Later on he makes specific bequests of trifling objects to different nieces and nephews, thus showing a complete comprehension of the necessities of a gift to individuals.

In the important paper bearing date January 7, 1880, disposing of his valuable estate he uses the phrase in the first clause, "to my nephews and nieces," showing that he understands the collective phrase which comprehended all of his collateral next of kin, except his brother, irrespective of which brother's children they might be; and appreciating

that that clause was coextensive with all of his nieces and nephews, he limits it in the next clause by saying it "is to be given to each of my brother Edwin's children," thus not only distinguishing those nieces and nephews from the nephews, children of his brother Charles, but fixing their *per capita* right to the fund, to be computed, by the use of the word "*each*."

Having thus definitely fixed the interest of his nieces and nephews, the children of his brother Edwin, the testator then proceeds by perfectly plain terms to divide the residuum between the two sets of children. And here it is to be observed that it is not a joint bequest to the children of his brothers Edwin and Charles to be equally divided between or among them, but the severance is before the designation of the recipients.

The *remainder* is to be equally divided. The subject of the division is the *remainder*. The character of the division is *equality* and the distribution when so divided is *between* the brothers Edwin's and Charles' children. And it is submitted that the use of his two brothers' names in that connection, when the mere designation of "nephews and nieces" would have sufficed for an equal per capita division, serves as the caption to designate the two sets of children who are to be the recipients of this equally divided residuum.

The language and style of this instrument are sufficiently peculiar to merit its classification among testamentary oddities, while the pecuniary bequests to his nephews and nieces, his brother Edwin's children, is not only stated in unusual language, but has a most peculiar basis fixed for the ascertainment of its amount. A fixed sum, $1,350.64, is to be calculated at 6 per cent interest from the 1st of July, 1854, down "to the opening of or reading this paper," i. e., the death of the testator.

Without the aid of any surrounding facts or circumstances this bequest is most extraordinary. With the aid, however, of the surrounding facts and circumstances it

becomes clear and rational, and not only the purpose of the testator, but the reason of his purpose, becomes plainly apparent.

The testator's brother Charles had owed him a sum of $1,350.63, within one penny of the principal amount of said legacy, since 1854, for which the testator held the five promissory notes of his brother Charles, dated January 2, 1854. The testator's brother Edwin was dead, and the testator appears to have sought to equalize the family of his two brothers by giving to the children of his brother Edwin the amount of his brother Charles' indebtedness with interest from the year of its creation down to the date of the testator's death. Having in this mode given to the children of his deceased brother Edwin a sum equal to the advancement to his brother Charles with interest, he then provides for the equal division of the residuum of his estate, and that residuum of his estate when and after being thus equally divided is to go to the two sets of children, those of his brother Edwin and those of his brother Charles.

It is respectfully submitted that no other rational explanation can be furnished of the curious language and the cumbersome disposition of his estate than that it was the intention of the testator by his special pecuniary bequest to the children of Edwin to place that set of children upon what he conceived to be an equality with his brother Charles, and having thus equalized the situation to divide the remainder of his estate into two parts between the children of his two brothers.

This was the view taken by the Supreme Court of Georgia in a case of somewhat similiar circumstances.

In White *vs.* Holland, 92 Ga. 216, the testatrix had two sisters and a brother, all of whom were living when the will was made, and all of whom had children.

The will directed the residuum to be equally divided between the sisters and the children of the brother.

The court, by Lumpkin, J., held that the children of the

brother, as a class, took *per stirpes* one-third and each of the sisters one-third, and reached this result not only from the context, but by reference to the proved fact that the brother was financially embarrassed and that certain conduct in his past life had led the testatrix to disregard him in the will and give what would otherwise have been his share to his children.

The Residuary Clause Directs an Equal Division Between Two Classes of Children.

Even if the facts and circumstances surrounding the testator be disregarded and the words of the will alone be considered it is submitted that in the construction put upon the residuary clause the learned Court of Appeals erred.

The word "*between*" without something to qualify its ordinary meaning must be taken in its proper sense as indicating a division *between two* and not *among* six.

In Ihrie's Estate, 162 Pa. St. 369, the residuary clause was—

> "The residue of my estate is to be divided *between* my husband's grandchildren and the children of Ferdinand Poree."

The court below decided that the two sets of children took *per stirpes*.

The Supreme Court, affirming this ruling, said (p. 372):

> "Did she mean that the fifteen grandchildren should take one-half and the four Porees the other half, or did she mean a division per capita, one-nineteenth to each?
>
> "*The word 'between' refers properly to two, and not more.* It is true that it is not unfrequently used, especially by the uneducated, and colloquially, in the sense of 'among,' as referring to more than two objects. But that admittedly is not its correct use. *The presumption is in favor of the proper and correct use of words, whether technical or belonging to the language of ordinary life.* . . .

> "But if we concede that the testatrix was illiterate, it would not follow that she used the word incorrectly. The great mass of the words even of illiterate persons are used correctly. The lapses are only occasional, or the language would cease to serve the purposes of communication. *Illiteracy therefore raises no presumption that words are used incorrectly.*"

In Green's Estate, 140 Pa. 253, the testator bequeathed half his property to his wife,

> "The other half to be divided equally between Josephine Lukens and the children of John R. Ash in the event of the death of Josephine Lukens, her portion to go to the children of John R. Ash."

The court held Josephine Lukens took one half and the children of John R. Ash the other half, and that the word "between" must be assumed to have been used in its ordinary signification.

The auditor, whose report is adopted by the court as its opinion, said (p. 255):

> "Applying this well understood distinction to the direction of the will that the half should be 'divided equally between Josephine Lukens and the children of John R. Ash,' it is obvious that, in drawing the line, he put on one side of it Miss Lukens and on the other he arranged the Ash children as a class. If he had intended each of them to have an equal share with her, he would have used other language, probably directing a division 'amongst Josephine Lukens and the children of John R. Ash, each to take an equal share.' To adopt the language used in Risk's App., 52 Pa. 269, 'had he meant the children to take *per capita*, he doubtless would have named them.'"

Had the testator in this case intended the residue to go to all his nephews and nieces in equal shares, *per capita*, it would have been very simple and natural to have bequeathed the residue to his nieces and nephews or to the children of his

brothers without specifying how it was to be divided. They would then have taken *per capita.*

As said by Chief Justice Marshall in Walker *vs.* Griffin, 11 Wh. 375, 379 :

> "Had he intended them to take equally, the most natural mode of expressing that intention would have been to devise the property to the children of Cyrus and John T. Griffin."

In Records *vs* Fields, 155 Mo. 314, the Chief Justice, delivering the opinion, says (p. 321):

> "The words of the third paragraph of the will are: 'The balance of my property and money I want equally divided between the heirs of William Fields and James Fields, deceased.' Now it is evident that their were no joint heirs of William and James. There were heirs of James, deceased, and there were heirs of William, deceased. The meaning, then, of the clause on this point is that the property is to be equally divided between the heirs of James Fields and the heirs of William Fields. Whether we construe the word 'heirs' in this clause as a technical word or as synonymous with children and grandchildren it will not solve the difficulties suggested by the astute counsel. Back of this lies the crucial test, Did or did not the testator intend to make two classes of these heirs or children?
>
> "What is, first, the ordinary and usual meaning of the words 'between the heirs of James and the heirs of William?' Unquestionably it conveys the thought of two parts, a distribution with reference to two parts, one part to heirs of James, the other part to heirs of William. Not only is this the natural and ordinary meaning of the words 'equally divided between the heirs of William Fields and the heirs of James Fields,' but this is also the true etymological significance of the word 'between.'
>
> . . . . . .
>
> (p. 322): "Using the word then in its proper and correct sense the phrase 'equally divided be-

> tween the heirs of William Fields and James Fields, deceased,' should be construed as 'equally divided into two parts, one to the heirs of James Fields and one to the heirs of William Fields.'"

Basis of the Construction by the Court of Appeals.

In reaching its conclusion as to the correct interpretation of this will the Court of Appeals does not consider the language of the whole will, nor any of the surrounding facts and circumstances shedding light upon the motives and purposes of the testator or the objects he had in view, or the peculiar situation which his brother, Charles McIntire, bore to this singular testamentary disposition, but it simply isolated the words of the residuary clause entirely apart from context and surrounding circumstances, and applied to them a technical rule of construction, which, it is submitted, has, under modern decisions, lost most, if not all, of its force.

In its opinion upon the question of the proper construction of the residuary clause of the will, the Court of Appeals says (Rec. pp. 75–6):

> "The provision that the residue of the estate 'be equally divided between my brothers Edwin and Charles' children' can only be satisfied by a division *per capita*. The children of Edwin and Charles are not divided into classes, but made one. Maddox *vs.* State, 4 H. & J. 539; Britton *vs.* Carson, 46 Md. 186. In the first of those cases the bequest was 'to be equally divided between my brother Justinian and my brother George's children.' In the second it read: 'shall be equally divided between my said daughter and the children of Virginia Carson.' In both the distribution was ordered to be made *per capita*. See, also, Benson *vs.* Wright, 4 Md. Ch. 278; Allender *vs.* Kepler, 62 Md. 7."

It is to be observed that the Court of Appeals confines itself, in its citation of authority, to the four decisions in Maryland, the earliest of which was decided in 1819, and

therefore of no controlling force in this jurisdiction. It is submitted, however, that the decisions in Maryland have not been entirely uniform and harmonious, and it may well be doubted, if, in view of recent decisions, the technical rule originating in Webb *vs.* Blakeler, *infra*, is in force in that State.

It is also respectfully submitted that an examination of the cases cited by the Court of Appeals will show that they are not entitled to very much weight in determining the question in hand.

Thus the case of Maddox *vs.* the State, 4 H. and J. 539 (1819), was an action on the bond of an executor.

The will bequeathed the residue "to be equally divided between my brother Justinian and my brother George's children."

The trial court instructed the jury (p. 540) that Justinian "took as tenant in common an equal part and no more with each of the children of George," to which the defendant excepted.

The opinion of the court, by Chase, Ch. J., in its entirety, is as follows (p. 541):

> "It has been established that in order to take advantage of the act of limitations it must be pleaded. The court concur with the court below in the opinions expressed in the several bills of exceptions."

On reference to the argument of counsel it appears (p. 541) that but two objections were urged to the judgment of the court below, viz: That the bond was barred by limitations and that there was a misjoinder of parties.

Thus it is seen that the question upon which the case is cited as authority was not urged by counsel and is not discussed or even mentioned by the court in its opinion.

In Brittain *vs.* Carson, 46 Md. 186, the residuary clause was as follows:

> "It is my will that the rest, residue, and remainder

> of my said estate, together with all my right and interest in and to the estate and property of my deceased wife Hannah Randolph, shall be equally divided between my said daughter, Amelia J. Brittain, and the children of Virginia Carson."

The court, by Brent, Justice, after stating that there was no other light to be thrown upon the will than was contained in these words says (p. 188):

> "A long series of uniform decisions has given a settled construction to provisions in a will similar to this, all holding that the legatees by force of the language used take equally and that the distribution is *per capita.*'

This decision, as will be seen from the report, rests solely upon the technical rule originating in the case of Webb *vs.* Blakeler, 2 P. Wms. 383, which, it is submitted, is no longer considered authority by the courts.

In the case of Benson *vs.* Wright, 4 Md. Ch. Dec. 278 (1848), the property was devised to trustees, in trust—

> "for the use of the children of Margaret Swornstedt, the daughter of my late husband Peter Benson; the children of William Benson, the son of my late said husband, and George Benson, also a son of my late said husband, equally, *as tenants in common*, their heirs and representatives forever."

A bill was filed to obtain the instructions of the court as to the distribution of the income of the trust estate.

The court held that the children and Benson took *per capita.* The question is not discussed by the chancellor, nor does it appear from the report to have been argued by counsel or contested in the pleadings, while the express terms of the devise declared all the parties to be equal tenants in common with each other.

In Allender *vs.* Keplinger, 62 Md. 7, the last case cited in the opinion of the Court of Appeals, the testator bequeathed the property to his daughters for life and after their death directed that it—

> "shall be equally divided among the lawful issue of my son John Etchberger lately deceased and the lawful issue of my two daughters Mary and Elizabeth aforesaid, *or the survivors of their issue*, but in case the property hereby bequeathed can not be equally divided then and in that case I hereby direct my executors hereinafter named to sell the same and *distribute* the proceeds thereof *share and share alike among* the lawful issue of my above named son and daughters *or the survivors of them the said issue.*"

Here it is to be observed that there was no direction to divide the property equally *between* the children of *two* persons, but an express direction to divide or distribute share and share alike *among* the lawful issue of *three* persons or the *survivors of such issue*, thus clearly making one class of all of the testator's grandchildren, without any reference to their parentage, and making this clear by treating the *survivors*, irrespective of whose children such survivors might be, the successors in right of those who should die.

The will plainly created a *joint tenancy* among all the grandchildren, expressly recognizing and providing for the *jus accrescendi* without discrimination as to the family in which death should occur or survivorship arise.

Other decisions by the Maryland Court of Appeals still further weaken the force of the foregoing cases.

In the case of Alder *vs.* Beall, 11 G. & J. 123 (1840), the language of the will was (p. 124):

> "The residue of my estate, real and personal, to be equally divided between the children of my sister Ann Latimer and their heirs forever, and the children of my sister Penelope Beall and their heirs forever."

The Orphans' Court held (p. 126) that the residue should be divided into *two* equal portions between the *two* sets of children.

The only question in the case was the correctness of this ruling by the Orphans' Court.

The Court of Appeals, after argument, affirmed the judgment, but without opinion. On application the court granted a rehearing and the case was elaborately argued; but the court, without opinion, affirmed the judgment.

In Plummer *vs.* Shepherd, 94 Md. 466, the testatrix devised as follows:

> "I give and bequeath all my real estate to my brother William and his heirs, to my deceased brother Samuel Shepherd's heirs, and the heirs of my deceased brother Joseph; also to the heirs of my deceased sisters, Eliza Bevan and Mary Plummer, share and share alike."

In construing this will the Court of Appeals of Maryland held that the word "heirs" in the will was to be construed as meaning *children* and not heirs in its technical sense, and that the language of the will created five separate classes of beneficiaries who took *per stirpes* and not *per capita*, the court saying in this connection (p. 469):

> "In arriving at this conclusion we do not overlook such cases as Maddox *vs.* The State, 4 H. & J. 539, where the testator directed the residue of his estate 'to be equally divided between his brother Justinian and his brother George's children,' the court holding that the one class thus created took as tenants in common and that distribution was to be made *per capita* and not *per stirpes*. See, also, to the same effect Brown *vs.* Ramsey, 7 Gill, 347; Thompson *vs.* Young, 25 Md. 461, and Brittain *vs.* Carson et al., 46 Md. 189. But in the case at bar the testatrix has herself clearly created five classes, each class designated as 'the heirs' or children of a deceased brother or sister, thus indicating that the share of her estate which would otherwise have been given to such brother or

sister shall go to his or her children. In other words, we are of opinion that this cause should be governed rather by the case of Alder et al. *vs.* Beall, 11 G. & J. 123, and Levering, &c., *vs.* Levering, 14 Md. 38, where it was held that it is apparent from the will itself that it was the intention of the testatrix that the distribution shall be *per stirpes* and not *per capita.*"

The Old Technical Rule of Construction No Longer of Force.

Whatever may be said as to the former importance of the technical rule of construction originating in Webb *vs.* Blakeler, 2 P. Wm. 383, adopted by the earlier cases in Maryland and applied by the Court of Appeals, it has been greatly shaken, if not rejected, in carefully considered cases in many of the States.

In Henry *vs.* Thomas, 118 Ind. 123, the testatrix bequeathed the residue of her estate—

> " to be divided equally between my brothers and my sisters and the children of deceased brothers and sisters and the brothers and sisters of Perry J. Brinegar deceased and the children of deceased brothers and sisters."

In speaking of this bequest the court said (p. 27):

> "The will in this case, it may be said, divides the legatees into two classes—the testatrix's brothers and sisters and the brothers and sisters of Perry J. Brinegar and the children of her deceased brothers and sisters and the children of the deceased brothers and sisters of Perry J. Brinegar."
>
> (p. 28) "We think the proper construction to be given to this will and the manifest intention of the testatrix was to give to the children of each deceased brother and sister of herself and deceased husband the same share that their parent would have taken if living—the child or children of one deceased

brother or sister to take the same share that one living brother or sister should take. In legal phraseology they take per stirpes and not per capita."

(p. 30): "The words 'to be divided between' apply as well to a division among classes as among individuals (Raymond *vs.* Hillhouse, *supra*).

"The rule as stated in Jarman on Wills is that when a devise or bequest is made 'to my son A and the children of my son B' in which case A takes only a share equal to that of one of the children of B they take *per capita*. It may be said that it is stated by the same author that this 'mode of construction will yield to a very faint glimpse of a different intention in the context.' . . . *This rule has been so far abrogated by the courts of the different states that it no longer has any practical force in the construction of wills*, and the weight of authority is to the effect that the beneficiaries take *per stirpes* unless the language used in the devise or bequest is such as to exclude that intention (Minter's Appeal, 40 Pa. St. 111; Fissel's Appeal, 27 Pa. St. 55; Clark *vs.* Lynch, 46 Barb. 68; Vincent *vs.* Newhouse, 83 N. Y. 505; Bool *vs.* Mix, 17 Wend. 119; Alder *vs.* Beall, 11 G. & J. 123)."

In Vincent *vs.* Newhouse, 83 N. Y. 505, the court said (p. 513):

"It may be conceded that under a devise or bequest to one and the children of another it has been often held that, prima facie, the persons take *per capita* and not *per stirpes*, and to this effect are many cases cited by the appellant. But the rule is technical, is subject to many exceptions, and courts readily depart from it when a different intent is discoverable (2 Jarm. on Wills, 107; Balcom *vs.* Haynes, 96 Mass. [14 Allen, 204]; Lockhart, 3 Jones Eq. [N. C. 205]; Fisher *vs.* Skillman's Exrs., 3 C. E. Green, 229; Clark *vs.* Lynch, 46 Barb. 81; Hoppock *vs.* Tucker, 59 N. Y. 202; Ferrer *vs.* Pyne, 81 N. Y. 281)."

In Balcom *vs.* Haynes, 14 Allen, 204, the court, by Mr. Justice Gray, said (p. 204):

> "It is well established as a general rule of the construction of wills, that by a gift either to the children of several persons, or to a person described as standing in a certain relation to the testator and the children of another person standing in the same relation, the objects of the gift take *per capita* and not *per stirpes;* and therefore in the latter case each child of the second person takes a share equal to the share of the first person. But this, like some other general rules for the construction of wills, has perhaps been adopted and adhered to by the courts rather from the importance of having some rule for interpreting phrases so frequently used by testators than from any strong and preponderating reason in its favor; and the authorities fully support the statement of Mr. Jarmin that 'this mode of construction will yield to a very faint glimpse of a different intention in the context' (2 Jarmin on Wills (4th Amer. Ed.), 111, 112, and notes)."

In Raymond *vs.* Hilhouse, 45 Conn. 467, the devise was in these words (p. 468):

> "All the residue of my estate, real and personal, I give and devise to the following-named persons to be divided equally among them: my sisters Rachel and Sarah, the grandchildren of my brother William and the grandchildren of my deceased sisters Delia and Mary, meaning by this to include all said grandchildren living at the time of my decease."

There were living at the testator's death two grandchildren of the testator's brother William, three of his sister Delia and fourteen of his sister Mary, and the question submitted to the court was whether these grandchildren took under the will per stirpes or all the legatees took per capita.

The court held that the estate should be distributed among the beneficiaries per stirpes and not per capita, and discussing the English rule on this subject, says (p. 474):

> "But we are confronted by the English rule of construction adopted in Massachusetts, New York, and some other States that 'a gift to children, grandchildren, or heirs is equivalent to naming them and is a gift to them individually.' 2 Jarmin on Wills, 1st Am. Ed. 111. The same author, after citing the above rule, adds: 'But this mode of construction will yield to a very faint glimpse of a different intention in the context.'
>
> "If the above rule is so easily set aside, it would seem equally reasonable that it should also yield to the presumption in favor of the natural heirs or next of kin for a distribution according to the statute in all cases where the language of the will is consistent with such a distribution, and the real intention of the testator is in doubt."

In Lyon *vs.* Acker, 33 Conn. 222, the testator gave the property—

> "To my three daughters and the children of my son Samuel A. Lyon, viz: To Mary F. Baker wife of Abram Baker, Susan E. Voorhis wife of William Voorhis, Josephine Lyon and the children of my son Samuel A. Lyon, the homestead where I now reside, to them and their assigns forever, share and share alike."

It was contended that the children of Samuel took *per capita* with the three daughters. But the court said (p. 224):

> "It is claimed that we can only give effect to the words 'share and share alike' by holding that the petitioners take per capita. Had the testatrix simply designated all the devisees by name it would be difficult to resist this claim, but she names her three daughters, and then adds 'and the children of my son Samuel A. Lyon.' The names and number of

these children do not appear in the will. They are referred to only *as a class;* a fact which seems to indicate that she intended to make all the grandchildren only equal to one of the daughters. At least it seems to us that this view of the case gives effect to the words in question as well as the other. If so they do not require us to adopt the construction contended for by the petitioners."

And the court held that the grandchildren took per stirpes.

In Minter's Appeal, 40 Pa. St. 111, the court says (p. 115):

"Then how shall we interpret the bequests? The testator says share and share alike among the children of my brother Adam and the children of my brother Martin, and to my sister Barbara, and by thus expressing himself he seems to make three classes and three equal shares. In another clause he leaves his thought more doubtful. What then can we do but resort to the usual distribution of the law for an analogy to help us? When we find a man distributing his estate, in whole or in part, among his next of kin, and he leaves the proportions in which they are to take doubtful, it is quite natural for us to suppose that he had the statutory or customary form of distribution in his mind, and to interpret his will accordingly. This would classify the legatees, as he seems to have done, and as the court below did, and allows the three classes to take as their parents would have done; thus they themselves take by a *quasi* representation and *per stirpes*. If he meant that his nephews should be each equal to his sisters the word each would have made his meaning clear."

It is respectfully submitted that the clear purpose of the testator was to divide the residuum of his estate into two equal portions, one to go to the children of his brother Edwin and the other to go to the children of his brother Charles.

The Third and Fourth Errors Assigned.

These assignments of error relate to the action of the court in allowing counsel fees paid to the counsel of the children of Edwin T. McIntire to be charged against the estate instead of against their individual shares in that estate. The Court of Appeals sustained this allowance on the ground that the administrator c. t. a. occupied the same position as an executor, and that an executor, after probate, had the duty to defend the will and was entitled to his counsel fees incurred in that behalf (Rec. p. 73).

Without considering whether an administrator c. t. a. bears such relation to the will, it is respectfully submitted that the counsel fees were not fees paid for services rendered him in that capacity, but were for services rendered to him and four other persons having no official relation to the will and no interest except as legatees.

The first allowance of counsel fees was made upon the petition of five of the legatees, filed March 5, 1886 (Rec. pp. 14–15), in which petition they recited that they were *legatees* under the will—

> "and if said will is set aside your *petitioners* would then, instead of receiving the bulk of the estate, be entitled to only one-half thereof."

They further recited that—

> "Your petitioners have felt called upon to oppose to the fullest extent of the law any action looking to the cancellation of so solemn an undertaking. *They* have to that end retained as counsel Gen'l S. S. Henkle, who for some months past has been managing *their* interests" (Rec. p. 15).

An order was passed authorizing this payment but charging the same to the distributive shares of the petitioners.

This allowance the Court of Appeals did not charge to the estate because no right was reserved in the order making it

to apply to the court to charge it against the estate as in the subsequent cases (Rec. p. 73).

The second payment was made under order of January 31, 1893, which recites that it is made—

> "On motion of S. S. Henkle, on his own behalf and representing the *legatees* Edwin A. McIntire, Sarah McIntire, Elizabeth McIntire Test, Martha McIntire, and Emma T. McIntire,"

and also provides—

> "That the said sum of five thousand dollars shall be charged against the interests of the said Edwin A. McIntire, Sarah McIntire, Elizabeth McIntire Test, Martha McIntire, and Emma T. McIntire in said estate without prejudice, however, to the right of said named legatees or of the administrator c. t. a. to apply to this court at the termination of the litigation touching the validity of the will of the said David McIntire to have said allowance charged against the estate of the said testator" (Rec. p. 19).

The next payment was authorized on July 12, 1895, upon the petition of the same five legatees, in which they refer—

> "To the former proceedings in this cause, particularly their petition and order thereon filed March 5, 1886, for the payment of counsel fees" (Rec. p. 20).

The said petition also prays that the allowance may be charged against the interest of the petitioners, but without prejudice to their right to apply to the court at the close of the litigation to have it charged against the estate; and an order to that effect was passed (Rec. pp. 21–22).

The next payment was authorized on January 28, 1896, upon a petition of the same five legatees, referring to the former proceedings in the cause and particularly to the petition of July 12, 1895, and asking that the allowance be charged against the interest of the petitioners in the estate, but without prejudice to their right to apply to the court at

the close of the litigation to have the payment charged against the estate (Rec. pp. 22–23) and on the same day an order was passed in accordance with the prayer of said petition (Rec. p. 23).

The next payment was authorized on June 1, 1896, upon a petition filed on that date by the same five legatees, which petition also refers to the former proceedings in the cause, and particularly to the petition and order of March 5, 1886, for the payment of counsel fees. The petitioners pray that the said allowance be charged against the interest and shares of the petitioners in the estate, but reserve the right to apply to the court to have the same charged against the estate, and an order was passed in conformity with the prayer of the petition (Rec. pp. 25, 26).

It is thus seen that all five of these legatees retained counsel to represent their interests and that it was for the services rendered to all of them and not to the administrator c. t. a. for which the fees were charged and allowed, the relation of four of said parties being merely that of legatees.

No subsequent application was ever made to the court to have these counsel fees, or any part of them, charged against the estate. No showing was made as to how much of the fees charged were for services rendered to the administrator c. t. a. or to the other four persons who had retained the counsel and upon whose petitions the allowances were made and against whose shares they were charged under all the orders authorizing the payments.

It is respectfully submitted, therefore, that the court was without authority to allow these counsel fees to be charged against the estate—first, because there was no application made for such charge and no opportunity to any person in interest to be heard with respect thereto; and, secondly, because the petitions for said allowances show on their face that four persons by whom the counsel are alleged to have been retained, in whose behalf the services are alleged to have been rendered and who requested the payment as a

charge against their respective shares, were mere legatees, having no official relation to the will and no duty whatsoever with respect to it.

The action of the Court of Appeals in this respect would, if affirmed, authorize every legatee interested under a will to engage counsel for the protection of his interests thereunder and charge the cost of such employment to the estate, which is precisely what has occurred in this instance.

It is respectfully submitted, therefore, that the Court of Appeals erred in allowing these counsel fees of the several legatees to be charged against the estate instead of against the individual interests of said legatees.

Respectfully submitted.

WM. G. JOHNSON,
Counsel for Charles McIntire.

Supreme Court of the United States.

OCTOBER TERM, 1903.

EDWIN A. McINTIRE, ADMINISTRATOR C. T. A. OF DAVID McINTIRE *et al.*, APPELLANTS AND PLAINTIFFS IN ERROR,

vs.

CHARLES McINTIRE.

No. 85.

Appeal from, and in Error to, the Court of Appeals of the District of Columbia.

Brief for the Administrator C. T. A. et. al. on Cross Appeal and Writ of Error.

STATEMENT OF THE CASE.

An outline of the very long and very troublous history of this case is exhibited in the record by copies of the docket entries of the former orphans' court (1–5) and the circuit court of the District of Columbia (43).

The futile contest against the last will of David McIntire, deceased, begun by his brother, Charles McIntire, in 1885, and continued by Charles McIntire, Jr., administrator and

also son and sole next of kin of said Charles McIntire, fills considerable space in the reports of the general term (19 D. C. 482) and of this Court (162 U. S. 383). The fierceness and pertinacity of the warfare waged at every point along the line against the will itself and against the administrator *cum testamento annexo* have seldom been equaled, even in the history of family feuds. One result is that, although the testator died nearly twenty years ago (on April 1, 1884), and his will was promptly probated and letters *c. t. a.* issued, and the administrator has been trying to settle ever since, the estate, sadly depleted by expenses and losses, is still in the courts.

Death has been busy among the parties, and even among the counsel, several of whom on each side, eminent in their profession, have passed away, but it has not brought peace in the case.

In all these proceedings, either Charles McIntire, or his son and administrator, Charles McIntire, Jr., has been the aggressor and in the position of plaintiff. The administrator *c. t. a.*, besides defending the validity of the will of David McIntire, as he was bound to do *virtute officii*, has always been ready and anxious to settle the estate, and with his mother and sisters has done all that was possible to that end, even going to the bounds of prudence in making concessions for the sake of peace.

Under these circumstances, it is respectfully urged by us that all reasonable intendments should be taken in favor of the administrator *c. t. a.*, as regards those credits allowed to him by the learned jurist (Mr. Justice Hagner) who held the special term for orphans' court business, and which were erroneously, as we submit, disallowed by the Court of Appeals of the District of Columbia.

This court will perceive that on the one side in this controversy is the administrator *c. t. a.*, who is also a

legatee, and with whom are aligned his three sisters and co-legatees, and the legal representative of a fourth sister, now deceased, who had assigned her share to their mother, who is also now deceased. Under the construction given to the will by the courts below, these represent a large amount in special legacies and five-sixths of the residue of the estate. They are entirely harmonious among themselves, and have been strictly on the defensive since the first attack, which was begun during the year after the will was probated and letters granted.

On the other side is now Charles McIntire, Jr., the administrator and universal heir of his father, Charles McIntire, and he is the sole disturbing element.

In the seeming confusion which attended the beginning of the trouble, a group of malcontents were admitted to the litigation, consisting of a Mrs. Galliher and her brothers and sister, children of Henry McIntire, a deceased brother of the administrator *c. t. a.* (9). After putting into the affair the regrettable tinge of bitterness that can exist, it seems, only in fullest intensity between very near relatives, somebody made the discovery that this group had no possible interest in the estate, either under the will or against it.

The last will of David McIntire (6) was probated and letters of administration *c. t. a.* were issued on April 12, 1884 (9).

Afterward, as appears by an allusion in the record (10), a suit in equity of some kind was begun by Charles McIntire, Jr., as a legatee, and the Galliher faction, against Edwin A. McIntire and others; and in that equity suit, on February 19, 1885, in a way that seems open to some criticism as matter of practice, an order was made for the administrator *c. t. a.* to pay into the orphans' court, that is to say, to the Register of Wills (not to the clerk of the

equity court), the assets of the estate. On the same 19th of February, 1885, a consent order was passed in the orphans' court (9, 10, 11) purporting to sanction this and various other arrangements, some of which might be questionable on the point of validity, since consent cannot give jurisdiction.

This was the beginning of the efforts by the administrator *c. t. a.* to get peace restored in the family—efforts which failed. In pursuance of them, however, in April, 1885, in a so-called arbitration before two of the counsel for the various parties (11, 12, 13) he agreed to be charged with an alleged sum of $10,000—saying "[I] will not contest any matters with my relatives" (12).

He did this only upon his four sisters, one of them since deceased, receipting to him, as of date February 25, 1885, for $2,500 each, so that this particular monetary sacrifice toward securing peace was made really by these ladies, one of whom, it is said, was even then in her last illness, and therefore particularly averse from family strife.

Notwithstanding all concessions for peace, Charles McIntire, the surviving brother of testator, began a contest in June, 1885, seeking to have the probate revoked and the will declared void. He made charges of unsoundness of mind of the testator and undue influence, which he produced no testimony whatever to support (162 U. S. 383). On such testimony as he had, issues were tried twice before juries (42, 43) and a verdict directed by the court against him and sustaining the will. The case was carried to the general term, and then after some struggle (3) to this court, where it was decided April 13, 1896. Before that, in 1890, the original contestant had died and his son, as administrator, took his place in the litigation (43) besides having an interest, in his own right, as legatee in case he failed to "break" the will as his father's ad-

ministrator. He was thus "on both sides of the fence."

During the same time proceedings went on actively in the special term for orphans' court business. In August, 1886, a consent order was made (16) that the Register of Wills, whose charges for costs seem to have been disputed (2), deliver all the assets of the estate in his hands:

"To the solicitors for the said parties in interest in said estate, * * * to be held by said solicitors, subject to the further order of the court herein, until the final settlement of the litigation touching the said estate."

This proceeding had no warrant in any statute, and apparently must be regarded as "*de facto sed non de jure.*" It was also an abrogation by consent of the former consent-orders by which the assets were "paid into court"—for the assets went into the hands of Mr. James M. Johnston (afterwards succeeded by Mr. Calderon Carlisle), one of the solicitors for the caveator, and Mr. S. S. Henkle (afterwards succeeded by Mr. Enoch Totten), solicitor for the caveatees (26). The solicitors thus entrusted with the funds were sometimes called by the name of "custodians" (17, 29), but this designation was not derived from any law or statute in regard to the orphans' court. The administrator *c. t. a.* remained in office all this time, performed such duties as he could, some of which were important, since the legal authority and title were always in him, and he rendered accounts from time to time (4).

On petitions of the caveatees, the orphans' court, from time to time, passed orders allowing the "custodians" of the assets to pay out certain sums for fees to the two eminent counsel, both now deceased, who successively defended the will, until $12,000 was thus expended (18,

20, 22, 25). It was recited in the orders that these sums should be charged against the shares of the caveatees in the estate without prejudice to their right to apply to the court to have said sums charged against the estate. When the "custodians" made their final report (27, 28) they took credit for these payments as against the cash which had been in their hands, thus practically charging the payment against the whole estate; and the orphans' court ratified and confirmed this by approving the report and account of the solicitors or custodians (29, 30), and by overruling the third exception to the account of the administrator *c. t. a.* (37). *This report or account of the custodians was participated in by the late Mr. Calderon Carlisle, one of the solicitors for Charles McIntire, Jr., equally with Mr. Enoch Totten, solicitor for the caveatees.*

In June, 1896, the mandate of the Supreme Court of the United States having been filed sustaining the will, and as it must have been apparent that no further progress could be made without restoring the administrator *c. t. a.* to his legal and proper functions, the custodians filed their final report, already mentioned, and on petition of the administrator *c. t. a.* he was directed to file an additional bond in the sum of $100,000 (31), which he did in July, 1896, with corporate security (32), and received again the assets of the estate after twelve years' interval. He has had sole charge of them for the seven years since then.

In December, 1896, the court approved his final account (4), but it was soon afterward contested by the irreconcilable Charles McIntire, Jr., who now came into the arena in his own right as a legatee and opened the contest now before this court. In August, 1897, after some interlocutory proceedings, the administrator *c. t. a.* presented an amended final account (34). Exceptions were filed to

it in October, 1897 (36), by Charles McIntire, Jr. (who always moved deliberately in this affair). They were brought to a hearing and overruled in the following year (39); the account was approved and final distribution was ordered (41).

From this action, Charles McIntire, Jr., appealed to the Court of Appeals of the District of Columbia (40). That court only on some minor details of the accounting differed from Mr. Justice Hagner, and remanded the cause for a restatement of the account in those particulars (68).

McIntire *v.* McIntire, 14 App. D. C. 337.

A restatement of the account was made in the probate court, successor to the orphans' court (47), and was excepted to by both sides (52), but passed over the exceptions (53), and cross appeals were taken (54, 55). In the Court of Appeals the action of the probate court was affirmed without argument (61); both sides appealed to this honorable court, and to provide against any uncertainty in the form of seeking a review here, also sued out writs of error (62, 63).

The questions argued in this brief arise on the exceptions of the administrator *c. t. a.* to the account as finally restated in the probate court.

Specification of Errors.

The rulings of the Court of Appeals erroneously surcharged the administrator *c. t. a.* on the final accounting, against his objections and protest, with over six thousand dollars, made up chiefly as follows:

Commission allowed to him by the orphans' court in its original order on his account, six per cent., would be now, on $86,410.42.....	$5,184 62
One item of fee paid to Mr. S. S. Henkle, as counsel for defending last will of David McIntire.....	500 00
Interest on $10,000, as elsewhere explained	511 40
Interest on a sum of $1,419.73 as elsewhere explained (to be computed).....	
Interest on partial distributions, as elsewhere explained (to be computed).....	

This makes an appealable amount, under the analogy of the decisions in—

Shields *v.* Thomas, 17 How. 5.
Market Co. *v.* Hoffman, 101 U. S. 113.
Texas, etc., Ry. *v.* Gentry, 163 U. S. 361.

Brief of Argument.

It is to be observed all through this case that it is within the bounds of accuracy to say that thus far not one contention on a matter of substance has been successful on the part of the trouble-makers, Charles McIntire, the father and son. This will appear from the fact that they first attacked the validity of the will of David McIntire, and were defeated from court to court, and finally in this the highest tribunal in the land. Charles McIntire, Jr., then attacked the construction put upon the will, and has been defeated from court to court, with a prospect, as we venture to believe, of defeat here.

Only as incidental to all this "false clamor" has Charles McIntire, Jr., been able to gain some rulings on

interlocutory matters, to the disadvantage of the administrator *c. t. a.*, and through him to all the Edwin T. McIntire branch of the family.

Under the fury of the onset of the two Charles McIntires, and the turmoil they have stirred up during nearly twenty years of strenuous but practically unsuccessful litigation, it would have been wonderful if the administrator *c. t. a.* or his various counsel had never made any formal slips, which might have been avoided on a calmer survey of the situation. But we submit that the assailants, defeated on the merits of the main issues raised by them, ought not to reap a benefit from mistakes that never would have occurred but for the confusion due to their contest. A simile may be borrowed from Emerson's "Conduct of Life":

> "Like a boat about to be overset, or a carriage run away with—not only the foolish pilot or driver, but everybody on board is forced to assume strange and ridiculous attitudes, to balance the vehicle and prevent the upsetting."

It is easy to see now that this estate ought to have been left in the hands of the administrator *c. t. a.*, at first as at last, instead of going the rounds of the Register of Wills and a number of "custodians;" it ought to have been settled during the nineteenth century instead of lagging over into the twentieth, etc., etc.; but these things were due primarily to the contests of Charles McIntire, Senior and Junior, the Achilles and Pyrrhus of this long siege, each of them—

> "*Impiger, iracundus, inexorabilis, acer.*"

Of course it was their privilege to apply to the courts and litigate to the extent of their ability, but the question is now whether the administrator *c. t. a.*, who was always

the party attacked, and who acted strictly on the defensive, as much so as any defendant in a suit at law, and whose task has been made most onerous and difficult by these attacks, shall be mulcted for the benefit of the assailants.

I.

First Exception of Administrator C. T. A. (52).

This relates to the disallowance of all commissions to him by the Court of Appeals, after the orphans' court had allowed him six per cent.

The allowance of commissions is a matter peculiarly within the province of the orphans' court, which has a close-at-hand view of the administration of the estate; and so far as discretion is vested in that court, its exercise is not subject to appeal.

Wilson *v.* Wilson, 3 G. & J. 201.

Parker *v.* Gwynn, 4 Md. 423.

Sinnott *v.* Kenaday, 12 App. D. C. 115; 14 App. D. C. 1.

The recital in the order of February 19, 1885 (10), "That said Edwin A. McIntire shall act as administrator of said David McIntire, but without any allowance for commission or other charge for his services as such administrator," is not only of very doubtful validity in law, but was evidently *conditional* upon what follows, and upon the whole arrangement of compromise, by which the assets of the estate, amounting then to some $50,000, were to be put in charge of the Register of Wills, the administrator *c. t. a.* was not required to increase his then bond of $8,000, a speedy settlement was expected, and the duties would be merely nominal.

Five months after that date the contest of the will was begun, and the estate has been tied up for a length of time wholly unanticipated. The whole situation has utterly changed. The Register of Wills received a handsome percentage for the short time during which he held the property (30). The solicitors who acted as custodians of the funds received a still larger one (30). Finally, the administrator *c. t. a.*, besides his work and anxiety in defending the will, was required to give an additional bond of $100,000 (31); whereupon the assets were delivered to him again, and he was charged with the heavy responsibility of distributing them in a hotly contested litigation. It would certainly be unreasonable to deprive the laborer of his hire under such circumstances. He has served more than seven years for the Rachel of his commissions.

It is especially worthy of note that Justice Hagner, who signed the order of the orphans' court of February 19, 1885 (9), allowed the commissions in the account approved March 5, 1898, thus showing how he understood his former order, in the light of the circumstances, and putting a construction upon it.

In *Eversfield* v. *Eversfield* (4 H. & J. 12, 13), even where an executrix had agreed to charge no commission, and the orphans' court had acted upon that agreement, yet, when she afterward applied for her commission, it was held that the court should grant it.

The right to commissions is a valuable right, and cannot be divested by an agreement without consideration or with a consideration that fails.

So where one executor claimed to have done all the work pertaining to his position, he was nevertheless directed to share his commission with his co-executors.

Richardson v. *Stanbury*, 4 H. & J. 275.

So the allowance made for commissions to a collector was held to have no effect upon the commissions of an executor or administrator of the estate.

Wilson v. *Wilson*, 3 G. & J. 20.

The learned Court of Appeals said, in reference to this subject (74): "*All* that remained to be done when the assets were redelivered to the administrator was to settle the final account and procure an order of distribution. The litigation over the will had ended in its establishment. *The labor and responsibility of administration were practically ended.*" (!)

With due respect to that court, this seems to be a complete misapprehension. The administrator has been charged with the responsibility of these assets, under bond of $100,000, since July, 1896. An examination of his account will show the collections he has had to make, the investments he has had to look after, the partial distributions he has conducted.

In the simple (?) task of settling the final account he has had to go, with the assistance of counsel, from the orphans' court to the Court of Appeals, from the Court of Appeals back to the probate court, and from the probate court back to the Court of Appeals, and then to this Honorable Court.

He can scarcely be expected to agree that the "labor and responsibility of administration were practically ended" when he received the assets for the second time.

The Court of Appeals also remarks that in any view only five per cent. can be allowed to the administrator because five per cent. was allowed to the "custodians," and the court is limited to ten per cent. in all. The difference of one per cent. which might be disallowed under this point need not be dwelt upon at length. We submit that the

allowance to the "custodians" is either an extra-legal proceeding which has no bearing on the legal rate of commissions, or the "custodians" were practically collectors of the estate within the principle of *Wilson* v. *Wilson*, 3 G. & J. 20. *The counsel for Charles McIntire, Jr., was one of the "custodians," and received half the commissions of five per cent.* (*about* $4,000) *allowed to them.*

II.

Second Exception of Administrator C. T. A.

This refers to one of the minutiæ by which on the reaccounting the delay caused by the contestants has been made to tell against the administrator *c. t. a.* and his branch of the family.

A partial distribution was made on or about January 1, 1898, by consent, the contestant, Charles McIntire, Jr., insisting that he get over $6,000, while the other beneficiaries received only $2,800 each. The $6,022.22 paid to Charles McIntire, Jr., was charged of course, against his share of the *residue* of the estate. We submit that the $2,800 paid to the others should be charged against their share of the residue in order to be consistent. It was charged by the court below against their special legacies to their disadvantage inasmuch as these bore interest.

The same reasons apply to the $2,500 each assumed by four of the special and residuary legatees (49, 50). These sums should be charged against their share of the *residue.*

Where money is paid to a party who holds both an interest bearing and a non-interest bearing obligation, he has a right to apply it on the latter.

Jones *v.* U. S. 7 How. 681.

III.

Third Exception of Administrator C. T. A.

The learned Court of Appeals, in its careful scrutiny discovered a point (73) which had not been expressly raised by the contestant below, and while it very properly sustained the credit for the bulk of the counsel fees for defending the last will of David McIntire, it surcharged the administrator *c. t. a.* (48) with one such fee paid, of $500, because the petition and order therefor (14, 15) were in slightly different form from those for the other counsel fees. We submit that through attention to form this is inconsistent in substance. The petition (14) shows that the fee was paid *for defending the last will and testament of David McIntire* from unjust attack, just as the other fees were; and it seems too much of a refinement of technicality to exclude it because the petition and order, being the first of the kind in the case, were not as cautiously worded as those subsequent.

IV.

Fourth Exception of Administrator C. T. A.

The facts in regard to the item of $10,000 have already been referred to in the first part of this brief. The four sisters of the administrator *c. t. a.*, one of whom, Adaline, was then on her death-bed, thinking that a disagreeable conflict with their own kinfolk, and a family disruption could be averted, insisted on assuming the burden of the disputed amount of $10,000. Their method of doing so was by giving their receipts for $2,500 each, whereupon the administrator *c. t. a.* agreed to be surcharged with $10,000, thus balancing his account in that respect. It was expressly made a part of the settlement, in the paper

filed by him and acted upon by the arbitrators (11, 12), that these receipts should be accepted as disposing of the sum at the same time that he was charged with it. It was not intended that in addition to diminishing the shares of his sisters by $2,500 each, the administrator *c. t. a.* was to be charged with interest on a sum of $10,000, whose actual existence he has always denied (10), though willing to assume the amount constructively for this particular purpose and in the hope of peace. Nothing was said in the arbitrators' report or the order of court thereon (13) about any interest, and there is nothing in the circumstances to cause interest to be charged. A court does not charge a fiduciary with interest, unless he has unreasonably detained money or has used it or realized interest on it himself.

Wilson *v.* Wilson, 3 G. & J. 20.

Handy *v.* State, 7 H. &. J. 42.

This constructive distribution of an amount constructively received was made within the year after testator's death (12). Neither Charles McIntire nor Charles McIntire, Jr., complained of it, or claimed any part in that particular distribution—for the father was, doubtless, preparing the contest of the will which he filed very soon afterward, and which made it uncertain whether he or his son would be entitled to the distributive share going to their branch of the family. Curiously enough Charles McIntire and Charles McIntire, Jr., were then, in effect, antagonistic even to each other. Their unsuccessful contest has kept the estate from being all distributed promptly, and ought not to be rewarded with interest charged like a penalty upon the administrator *c. t. a.*, who was rendered powerless to distribute the estate by the action of the court or contestants.

Without doubt, the administrator *c. t. a.* expected at that time—in April, 1885—an immediate distribution of the whole estate, as no contest of the will had then begun. If such a distribution had been made under the will, Charles McIntire, Jr., would have received the benefit of this surcharge of $10,000. The delay has not been due to the administrator *c. t. a.*, nor could he use or invest money which he did not have.

V.

Fifth Exception of Administrator C. T. A.

This has reference to a balance of $1,419.73 in the hands of the administrator *c. t. a.* from a dividend on Pennsylvania R.R. stock in 1891. At the time it was received, the order to pay the assets to the Register of Wills was certainly no longer in force, for the assets had been transferred to the solicitors of the parties (16) in 1886. The administrator *c. t. a.* reported this small balance publicly to the court (35), but no action was taken by the court or any of the parties to make him pay it to his solicitor and the opposing solicitor as "custodians," and it accordingly remained in his hands, in the hope that the litigation would soon terminate. It was kept intact and not mingled with other funds, and there is of course no proof that he used it or made interest on it.

On the contrary, under a suggestion in the opinion of the Court of Appeals (76) he filed affidavits (45, 46) showing that he retained the amount by advice of his counsel, Mr. S. S. Henkle, who was one of the "custodians," and made no use of it except to pay out of it some costs of the litigation that has been forced upon him.

We submit that the decree of the Court of Appeals of

the District of Columbia should be reversed, in so far as to sustain the exceptions of the administrator *c. t. a.*; but that the exceptions of Charles McIntire (Jr.) should be overruled, on his appeal and writ of error (No. 84 at this term), to be heard herewith, but in regard to which we file a separate brief.

WILLIAM HENRY DENNIS,
HENRY E. DAVIS,
CHARLES COWLES TUCKER,
Attorneys for Administrator C. T. A. et als.

Supreme Court of the United States.

OCTOBER TERM, 1903.

CHARLES McINTIRE, APPELLANT AND PLAINTIFF IN ERROR,

vs.

EDWIN A. McINTIRE, ADMINISTRATOR C. T. A. OF DAVID McINTIRE.

No. 84

BRIEF FOR ADMINISTRATOR C. T. A.

I.

APPELLANT'S FIRST, SECOND AND FIFTH ASSIGNMENTS OF ERROR.

The principal and most important question in this case arises upon the first, second and fifth assignments of error of Charles McIntire (hereinafter called the appellant), appellant and plaintiff in error in No. 84 and the defendant in error and appellee in No. 85. That question is whether, under the residuary clause of the will of his uncle, David McIntire, the *residuum* of the estate should be distributed *per capita* or *per stirpes*.

David McIntire died April 1, 1884 (R., p. 14), leaving

surviving him a brother, Charles McIntire, father of the Charles McIntire who is the party to these appeals, and five nephews and nieces, the children of a deceased brother, Edwin McIntire. He left a will dated January 7, 1880, by which, after making a bequest to each of his brother Edwin's children of $1,350.64, with interest from July 1, 1854, until testator's death, he provided that "*The remainder, if any, is to be equally divided between my brothers Edwin and Charles children.*" At the date of the will, the testator's brother Charles was, as stated, living, and had two sons, Charles and Henry. Henry died before the testator, namely, April 1, 1880, and his father, Charles, Sr. died pending proceedings which he instituted and which his son, Charles, Jr., the party to these appeals, continued as his father's administrator, seeking to revoke the probate of the will on the ground of undue influence, want of testamentary capacity, fraudulent alteration of the will, etc.

These proceedings were unsuccessful, this court in 162 U. S. 383, affirming an order of the Supreme Court of this District sustaining the probate of the will, after the trial of issues framed on the caveat of Charles, Sr. This attack on the validity of the will by father and son having failed, Charles, the son, now contends that under a proper construction of the residuary clause of the will, he is entitled to one-half of the *residuum* of the estate, instead of one-sixth. The orphans' court and the Court of Appeals have both decided the question adversely to him, the latter court resting its decision on a line of Maryland cases, establishing a rule of construction in such cases which has been followed since 1819, and which requires a distribution *per capita* and not *per stirpes* to be made when language is used in a will similar to that of the testator here, and nothing in the context of the will shows a contrary intent.

Charles, Jr., contends, first, that the face of the will itself shows a testamentary intent to separate the nieces and nephews into two classes, distinguished and identified by their respective fathers; and, secondly, that certain extraneous testimony is admissible to show, and if admitted will show, such intent. We will treat these contentions in the order stated.

Special Rule of Construction in this Case.

If David McIntire had died intestate, his estate, which consisted of personalty only, would have been distributed *per stirpes;* that is, one-half to his deceased brother Edwin's children, and one-half to his living brother Charles. For some reason, not difficult to conjecture, if it be material to know what it was, he desired to exclude his brother Charles from a participation in his estate on his death, and he therefore made a will, effectually cutting off that brother, but recognizing the moral claims of his children, Charles, Jr., and Henry, on his, the testator's bounty. Notwithstanding the fact that those children had no greater natural claims on the bounty of the testator than did the five surviving children of his deceased brother Edwin—indeed, not so much, for the latter were his legal next of kin, while the former were not—and that all of the nephews and nieces were of an equal degree of kinship to him, it is now contended that it was the intention of the testator to make an unequal distribution among his nephews and nieces, giving to two of them one-half of the estate, because of some supposed or quasi-representation by them of their living father, who had incurred the displeasure of the testator and had been ignored by him in making the final disposition of his estate. Furthermore, it should not be lost sight of that when this will was made,

Edwin's children were fatherless, while Charles' children had a living father to support and maintain them, which presumably he was doing.

If the testator's brother Charles had been dead at the time the will was made, and the testator had used the same language as he did use, namely, "*The remainder, if any, is to be equally divided between my brothers Edwin and Charles children,*" or if Charles had been living and the language had been "*The remainder to be equally divided between my brother Edwin's children and my brother Charles,*" there would have been room for argument that the meaning of the words of the will under discussion was as is now contended for by Charles, Jr., although all of the English authorities and the vast weight of American authority—as will hereinafter be shown—are against such contention; and the cases cited on behalf of the appellant would have some bearing upon the question under discussion. But as it is, the question whether the English rule of construction, as laid down in 2 Jarman on Wills (6th Am. ed., *p. 1051), that, "Where a gift is to the children of several persons, whether it be to the children of A. and B., or to the children of A. and the children of B., they take *per capita* and not *per stirpes*," which the appellant contends has been repudiated by the American courts—is, we submit, one which, strictly speaking, is not involved in this case.

The fact that Charles, Sr., the brother of the testator, was *living* when the will was made, lends a significance to the words of the will and throws a light upon the intent of the testator, which renders an interpretation of the language of the will a matter of little or no difficulty.

The following cases are illustrative of the point here made:

In *Blackler* v. *Webb*, 2 P. Wms. 383, the testator be-

queathed the surplus of his personal estate equally to his son James, and to his son Peter's children, and to his daughter Traverse, and to his daughter Hannah Webb's children, and his daughter Man. At the making of the will Peter was dead, leaving several children, and Hannah Webb was living, but her husband was in low financial circumstances, and had been twice a bankrupt.

The report of the case thus states the conclusion of the court:

"Lord Chancellor at first seemed inclinable that the grandchildren should take *per stirpes* only; yet at length he decreed that the testator's son James, and the children of the testator's deceased son Peter, and his daughter Traverse, and the children of the testator's daughter Hannah Webb, and his daughter Man (being in all fourteen in number) should each of them take *per capita*, as if all the grandchildren had been named by their respective names; *and that the grandchildren could not take according to the statute, or in allusion thereto, for as much as the testator's daughter, Hannah Webb, was living, and so her children could not represent her; and to determine that the grandchildren should take per stirpes would be to go too much out of the will, and contrary to the words, when the meaning of the testator might be according to his words, and that meaning a reasonable and sensible one.*"

In *Bryant* v. *Scott*, 1 Dev. & Bat. Eq. (N. C.) 155, the bequest was of a residue of personalty—

"to be equally divided" between the following persons, viz., "Edith Bryant, Margaret Parker, Julia Vallentine, and the children of my daughter Temperance, had by John Scott, and the children of my deceased son James, and the children of my son William D. Britt."

This residue consisted entirely of personal estate, the lands having been devised in a previous clause to William

D. Britt, his son, whom he also appointed one of his executors. Chief Justice Ruffin, who delivered the opinion of the Court, said:

"Several chancellors have, in cases like this, of gifts to the testator's children and to the children of deceased children, expressed the apprehension that, in distributing *per capita*, they did not follow the intention of the testator; but they have never been able to find a ground for holding otherwise, and have thought themselves bound to that construction, although it might not be according to the intention, rather than adopt the opposite one, which obviously does violence to the words of the testator. The intention that the grandchildren should take *per stirpes*, is conjectured from the reasonableness of it, as applied to the state of most families. *But when the gift is made under circumstances which exclude all reference to the statute of distribution, that conjecture must be given up; and when to that is added a direction for an equal division among all the donees, no court could feel safe in making an unequal division.*

"The present case has both of those distinguishing circumstances. One set of the grandchildren are the children of a son of the testator, *who was then living*, and, indeed, was the executor of the will. That brings it to the very point on which the leading case on this subject, *Blackler* v. *Webb*, 2 P. Wms. 383, was decided. That was a bequest of a personal residue equally to several of the testator's children by name, and to the children of a deceased child, and the children of a living child, without any words of division. At first, Lord King inclined that the grandchildren took *per stirpes;* but, at length, he was obliged to decree otherwise, *because the mother of some of the children was living; which showed that the testator could not have looked to a legal distribution, in which grandchildren represented their deceased parents.* That case is mentioned in all the subsequent ones, and has never been questioned. The rule, indeed, is not confined to cases in which a parent of one set of the donees is alive, but extends to legacies to 'the children' of deceased parents;

as to A. and B., and the 'children' of C., deceased, and the 'children' of D., deceased, 'equally to be divided between them.' *Northey* v. *Strange*, 1 P. Wms. 340; *Butler* v. *Stratton*, 3 Bro. Ch. Ca. 367; *Lady Lincoln* v. *Pelham*, 10 Ves. 166; *Davenport* v. *Hunbury*, 3 Ves. 257."

In *Scott's Estate*, Gwynn's Appeal (1894), 163 Pa. St. 165, the will provided, as to the residue of the estate:

"Should my beloved niece die without issue, then in that case I will and devise the remainder of my estate after her decease without issue as aforesaid, to be divided among my nephews and nieces, to wit, the legal heirs of Mrs. Lillie A. Gwynn, the heirs of my beloved brother, James A. Scott, and the legal heirs of my beloved brother John W. Scott and Anna R. Stuckey (a niece), each to take share and share alike."

The niece to whom the residue of the estate was first given died without issue. It was held that the estate should be divided among the nephews and nieces mentioned in the will, *per capita* and not *per stirpes*. The testatrix left surviving her a brother, John W. Scott, and two sisters, Mrs. Gwynn and Mrs. Hutchinson. Her brother, James A. Scott, and her sister, Mrs. Barnes, died before her. All of these brothers and sisters had children, and those of John W. Scott, Mrs. Gwynn, and James A. Scott, and one of the two children of Mrs. Barnes, Anna Stuckey, were beneficiaries under the clause of the will quoted, while the children of Mrs. Hutchinson and Rush Barnes, a brother of Anna Stuckey, were not mentioned.

The court said:

"The benefit here was evidently intended for the legatees individually, as nephews and nieces, and not as representing their parents, *who*, in two instances, *are still*

living and were entirely passed over. The nephews and nieces are treated as if their parents were dead. * * * The intestate laws which would have required a distribution *per stirpes* are passed over in order to exclude brothers and sisters and give the estate directly to nephews and nieces." * * *

This case is especially significant in view of the citation by appellant in his brief of several earlier Pennsylvania cases, claimed by him to support his contention.

General Rule of Construction.

The brief filed on behalf of the appellant says (p. 17) that "whatever may be said as to the former importance of the technical rule of construction originating in *Webb* v. *Blackler*, 2 P. Wms. 383, it has been greatly shaken, if not rejected, in carefully considered cases in many of the States." The rule of construction here meant was doubtless that stated in 2 Jarman, *supra*, and adopted in *Northey* v. *Strange*, 1 P. Wms. 340, and other even earlier English decisions heretofore referred to, and not that in *Blackler* v. *Webb*, in which latter case, as the report, *supra*, shows, and as pointed out by Chief Justice Ruffin, in *Bryant* v. *Scott*, *supra*, the Lord Chancellor came to the conclusion that the distribution should be made *per capita* and not *per stirpes*, because the mother of some of the children was living, similarly as, in the case at bar, the father of two of the testator's nephews was living when the will was made. But assuming that the broad rule as laid down in Jarman is the one referred to by counsel, we think it can be demonstrated that although some of the American courts have leaned against it, the great weight of American authority is with it. Following are cases by States supporting the rule:

ALABAMA.

In Alabama, the rule of construction contended for herein, is followed. See *Howard* v. *Howard*, 30 Ala. 391.

CALIFORNIA.

In *DeLaurencel* v. *DeBoom*, 67 Cal. 362, the testator left all his property in trust to be distributed among his heirs, the children of a deceased sister, and those of a deceased brother. There survived him three children of the deceased sister and five children of the deceased brother. It was held that the children were to take the property in equal shares and not by way of representation; on the ground "that where a class is named as devisees, all of that class shall share equally."

DISTRICT OF COLUMBIA.

In *Walker* v. *Griffin*, 11 Wheat. 375 (1840), where a portion of the testator's estate was directed to be given to certain families in unequal proportions and "the balance to be given to the *families* of C. and J. T. Griffin's children in equal proportion," it was *held* that the children of the latter took *per stirpes* and not *per capita*, but Chief Justice Marshall said that had the testator intended the children to take equally, "the natural mode of expressing that intention would have been to devise the property to the *children of Cyrus and John T. Griffin. They would then have taken individually and not by families.*"

In *Moffit* v. *Varden*, Fed. 9 Cases, 689 (5 Cranch C. C., 658) the will read:

"I leave all my other property, both real and personal, to be equally divided among the children of my brother

Richard Varden, and my sister Henrietta Micknm, when they arrive at the age of maturity."

The court, Chief Justice Cranch delivering the opinion, said:

"The devise in this case being directly to the children of the testator's brother and sister, the devisees take *per capita* and not *per stirpes;* and each is entitled to an equal share."

In *Follansbee* v. *Follansbee* (1895) 7 App. D. C. 282, the bequest was after the termination of a life estate "to the children of my brothers, J. M. F. and J. V. F., and to the children of my late brother, G. F., in equal proportions, share and share alike." *The brothers, J. V. F. and J. M. F., were living at the time of the testator's death.* The court held that the distribution was to be made *per capita* and not *per stirpes.*

GEORGIA.

In *Payne* v. *Rosser*, 53 Ga. 662, the testator after creating a life estate, provided that his property was to go to and be equally divided *between* the children of Thomas and Jane M., deceased, the children of W. D. G., deceased, and the children of N. A. G., who was then living. The court held that distribution should be *per capita* and not *per stripes*, saying that:

"The devisees are all equally of kin to the testator, to wit: the children of his niece and nephews, and the gift is to them directly. * * * In 1 Roper on Legacies, it is said that the taking *per stirpes* always presupposes an irregularity of relationship. See 2 P. Wms. 383; 3 Bro. C. C. 367. The same authority, 1 Roper 157, gives great weight to the terms 'equally divided' when used in a will,

for ascertaining the intention of the testator as to whether the objects of his bounty are to receive it *per capita* or *per stirpes*. It is therein said that if the testator's next of kin are a brother and the children of a deceased brother and thus not related to him in equal degree, yet if he has shown an intention that they shall take his property in equal shares, that is *per capita*, the distribution by the statute will be superseded. This may occur when the bequest is to relations 'and next of kin,' etc., to be equally divided among them or by expressions of a like import. In the will under consideration, there was the direction for an equal division *between* certain devisees, who were equally related to the testator, and no indication that it was his intention for them to take as classes, which very probably would give to them individually unequal shares in the estate."

See also *Huggins* v. *Huggins*, 72 Ga. 825.

In *White* v. *Holland*, 92 Ga. 216, cited by counsel for the plaintiff in error, the court expressly refused to decide from the terms of the will itself whether the distribution should be *per capita* or *per stirpes*, and concluded from extraneous evidence alone, showing a marked degree of affection for one of the legatees, that the testator intended that the distribution should be *per stirpes*, and decreed accordingly. (In deciding that such evidence was admissible to show the intent of the testator, as against his words, that case is utterly at variance with the cases in this and other courts hereinafter cited on the subject.)

ILLINOIS.

The rule is also followed in Illinois. In *Pitney* v. *Brown*, 44 Ill. 363 (1867), the will provided:

"The balance remaining of said fund I hereby direct shall be equally divided *between* the children of my late brother, Mahlon Pitney, and my brother-in-law, William

H. Brown, of the city of Chicago, a large portion of my property having been received through his father and the father of my late wife, Betsy H. Pitney."

There were three children of Mahlon Pitney, and the question was whether the distribution of the residue of the fund was, as between them and Brown, to be *per stirpes* or *per capita*. The court reviewed many authorities, both English and American, and followed the rule laid down in 2 Jarman, 111, ordering the distribution to be made *per capita*.

See also *Best* v. *Farris*, 21 Ill. App. 49.

KENTUCKY.

In *Purnell* v. *Culbertson*, 12 Bush (Ky.) 369, the testator after a devise for life, provided for the distribution of his real and personal property—

"equally *between* my nephew, Julius Culbertson, of this county, Mattie Ervine, Ettene Case, and the children (two) of Thomas D. Purnell, niece and nephew of mine, and residing in and about Natchez, Miss."

The court in deciding that the distribution should be *per capita*, after quoting a number of authorities, including Jarman on Wills, said:

"It is plain the testator did not intend to follow the laws of descent and distribution in the division of his estate among these collateral kindred, nor did he intend to give to each class of children what their ancestor would have been equally entitled to had he been living, but, on the contrary, we are of the opinion that the testator intended that his entire estate at the death of his wife should go to the devisees named, to be equally divided between them *per capita*, share and share alike."

And so in *McFatridge* v. *Holtzclaw*, 94 Ky. 352, where the devise was of property to be—

"equally divided *between* the heirs of my brothers and sisters, share and share alike, as though my brothers and sisters were living,"

it was held that the children of the testator's brothers and sisters took *per capita* and not *per stirpes*, their parents being alive not only at the date of the will, but at the date of its publication. See also *Brown* v. *Brown*, 6 Bush (Ky.) 648.

MARYLAND.

Maddox v. *State*, 4 H. & J. 540, was a proceeding instituted in Maryland in 1816. The language of the will which was construed by the Court of Appeals of Maryland, which will was dated September 17, 1798, was practically identical with the language in the will of David McIntire under construction in the case at bar. The language was:

"All of the residue of my estate, after my just debts are paid, to be equally divided *between* my brother Justinian, and my brother George's children."

Justinian survived the testator, but George predeceased the testator, leaving six children, all of whom were living at the death of the testator. The judgment of the lower court was that the legatees took as tenants in common, each receiving one-seventh of the estate *per capita*, and this judgment was affirmed by the Court of Appeals. It is true that the opinion is brief, the court simply stating that it concurred with the court below in the opinions expressed in several bills of exceptions. But in the case of *Alder* v. *Beall*, 11 G. & J. 123, cited by appellant in support of his contention, no opinion at all was delivered by the court.

Alder v. *Beall* (*ubi sup.*) was the next case which arose in Maryland bearing upon this subject. It was decided in 1840. The provision of the will was:

"The residue of my estate, real and personal, to be equally divided *between* the children of my sister, Anne Latimer, *and their heirs forever*, and the children of my sister, Penelope Beall, *and their heirs forever*."

The fact that the will devised real estate as well as personalty, and that it used apt words in referring to the children of each sister, namely, "*and their heirs forever*," to vest a fee simple title in the children of each sister, and therefore indicated an intent to separate such children into classes, was urged in the argument. The Court of Appeals affirmed the decision of the orphans' court directing a distribution *per stirpes*, but without an opinion.

The next case in Maryland in point of time was that of *Brown* v. *Ramsey*, 7 Gill, 348 (1848.) There the language was:

"The residue to be equally divided and paid to the following named persons, viz: To the children of my sister, H. B., deceased (naming five of such children). To the children of my sister, R. R. (naming four of such children). To the children of my brother, E. E., deceased, (naming two of such children). To the children of my brother, J. E., deceased, Isaac, two shares, Samuel J. and the children of his daughter, S. K., deceased, namely, John and Hannah, share and share alike, with the exception of Isaac's two shares, aforementioned."

The court held that the distribution was to be made *per capita* and not *per stirpes*, and distinguished the case of *Alder* v. *Beall* (*supra*), stating that that was—

"a bequest to the children of one sister, and a bequest to the children of another sister, and one class of chil-

dren (although each of that class is to have a joint interest in so much as in bequeathed to that class) is to have no interest in the part given to the other class."

Levering v. *Levering*, 14 Md. 30 (1859), was the next case which a rose in that State. The distribution in that case was directed to be *per stirpes* and not *per capita*, but the case is readily distinguishable from the case at bar and it seems unnecessary to quote here from it.

The next two cases arising in Maryland were the cases of *McPherson* v. *Snowden*, 19 Md. 197, decided in 1862, and *Thompson* v. *Young*, 25 Md. 450, decided in 1866, in both of which the distribution was ordered to be made *per capita* and not *per stirpes*. The language of the wills, however, differed to such an extent from the language of the will under consideration, that it is deemed unnecessary to quote from the cases. In both of them, however, *Levering* v. *Levering* is distinguished.

In 1876 the case of *Brittain* v. *Carson* (46 Md. 186) was decided. The language of the bequests was that the residue—

"Shall be equally divided *between* my said daughter, A. J. B., and the children of V. C."

The testator left surviving him his daughter, A. J. B., and two grandchildren, the children of his deceased daughter, V. C. There was nothing in any other part of the will to show an intention on the part of the testator that his grandchildren were to be regarded in the distribution of the residue of his estate as a class, taking by representation. The court in the opinion referred to a number of English cases, one of them being that of *Lenden* v. *Lenden*, 10 Simons, 626, where the testatrix directed the residue of her property "to be equally divided" between S. and

M., daughters of her sister, E. S., and E., daughter of her sister, S. M., and her children; and then proceeded:

"In this State the rule of construction is also well settled. In the case of *Maddox* v. *the State*, 4 H. & J., 539, where the testator directed the residue of his estate to be equally divided between his brother Justinian and his brother George's children, the court held that they took as tenants in common and that the distribution was to be made *per capita* and not *per stirpes*. The language of this will is most strikingly similar to that in the will before us, and it might have been sufficient to have referred to that case as deciding the question involved in this. This case has been followed and adopted by the subsequent decisions in this State. *Brown* v. *Ramsey*, 7 G., 347; *Thompson* v. *Young*, 25 Md. 461; *Benson* v. *Wright*, 4 Md. Ch. 278. The cases of *Alder* v. *Beall*, 11 G. & J. 123, and *Levering* v. *Levering*, 14 Md. 38, where the distribution was directed to be made *per stirpes*, are manifestly, as will be found in other similar decisions, cases in which it was apparent from the will itself, that the testator so intended the distribution to be made. They are, in this respect, readily distinguishable from the present one."

Chief Justice Alvey, who sat with the court below in the determination of the case at bar, sat with the Court of Appeals of Maryland in the case of *Brittain* v. *Carson*.

Allen v. *Keplinger* (1884), 62 Md. 8, required a *per capita* distribution to be made, largely upon the authority of the cases heretofore referred to. The language of the will is set out on page 15 of appellant's brief.

The next case was that of *Plummer* v. *Plummer*, 94 Md. 66 (1902). The language of the will is given on page 16 of appellant's brief, as also an extract from the opinion of the court. From the extract given, it will be seen that the Court of Appeals of Maryland did not overlook *Maddox* v. *The State*, *Brown* v. *Ramsey*, *Thompson*

v. *Young*, and *Brittain* v. *Carson*, *supra*, but recognised them as correct, and distinguished the case under consideration from them. Attention is also invited to the fact that in *Plummer* v. *Plummer*, as in *Alder* v. *Beall*, the will dealt with real estate and not with personalty only.

MASSACHUSETTS.

In *Hill* v. *Bowers* (1876), 120 Mass. 135, a testator left the residue of his property—

"To the children of my brother A., by his present wife, and the survivors of them, and to the children of my nephew B., and the survivors of them, their heirs and assigns forever."

At the death of the testator, A. had eight children and B. had two. It was held that the children of A. and of B .took *per capita* and not *per stirpes*, Chief Justice Gray, who delivered the opinion of the court, saying:

"The general rule is that by a bequest to the children of A. and to the children of B., the children take *per capita* and not *per stirpes*, in the absence of words indicating a different intention. There are no such words in this will. The repetition of the words, 'and the survivors of them,' only makes clear the intention of the testator not to include any children, of either person named, who did not survive the testator. Upon his death, the children who should take were ascertained, and the residue of the estate was to be equally divided among them. *Blackler* v. *Webb*, 2 P. Wms. 383; *Butler* v. *Stratton*, 3 Bro. Ch. 367; *Lincoln* v. *Pelham*, 10 Ves. 166, 176; *Heron* v. *Stokes*, 2 Dru. and War. 89; S. C. 1 Con. and Laws. 270; 4 Irish Eq. 284; *Collins* v. *Hoxie*, 9 Paige, 81; *Weston* v. *Foster*, 7 Met. 297; *Balcom* v. *Haynes*, 14 Allen, 204."

MISSISSIPPI.

In *Nichols* v. *Denny*, 37 Miss. 59, the language of the will was:

"The balance to be equally divided *between* my nephews and nieces."

The court said in the absence of any indication to the contrary on the face of the will, the rule is that:

"Where a gift is to the children of several persons, whether it be to the children of A. and B. or to the children of A. and to the children of B., they take *per capita* and not *per stirpes*." 2 Jarman on Wills, *Wel.* v. *Bradley* 2 Vt. 705; *Lugar* v. *Harman*, 1 Cox R. 250; 10 Ves. Jr. 166, 8 Ves. Jr. 604, 1 Bev. 607; *ex-parte Leith*, 1 Hill Ch. 153.

Crawford v. *Redus*, 54 Miss. 700, was a case more in point. There the language of the will was:

"The remainder of my estate I desire shall be equally divided *between* my sons and daughters now living, and my grandchildren, Lucy and Mollie, daughters of my son A. T. Redus, deceased, and Mary Martha Talliaferro and Thomas Burnet, children of my daughter Silbrino Coats, deceased."

The court said:

"It is well settled in this State and elsewhere, that this language, in the absence of other provisions showing a contrary intention, imports the taking of a equal share by each of the legatees; or, in other words, that they take *per capita* and not *per stirpes*. *Nichols* v. *Denny*, 73 Miss. 59, 2 Jar. on Wills, 111, 2 Williams on Exer's (Perkins Ed.) 1623, note *q* and authorities there cited."

NEW HAMPSHIRE.

In *Farmer* v. *Kimball* (1866), 46 N. H. 435, the residuary devise was to the testatrix's cousins and to the children of her mother's cousins—

"to be equally divided *between* them."

The court held that the distribution should be *per capita*, citing 2 Jarman, 111, and a large number of English and American cases, including *Walker* v. *Griffin*, 11 Wheat. 374. The court said:

"This construction is not controlled by the use of the word 'between.' *Abrey* v. *Newman*, 17 L. & Eq. 126; *Lenden* v. *Blackmeer*, 10 Simons, 626; *Warrington* v. *Warrington*, 2 Hare, 54; *Williams* v. *Yates*, 1 C. P. Cooper 177."

And, in conclusion:

"Upon the whole we think that any inference of an intention to divide the residue by classes is merely conjectural and quite too uncertain to prevent the application of the well settled general rule. *Lincoln* v. *Pelham*, 10 Ves. 176; *Kean* v. *Roe*, 2 Harrington, 120."

This decision was followed in *Campbell* v. *Clark* (1887), 64 N. H. 328, where a devise was "In equal shares to my nieces and nephews and to the nieces and nephews of my former husband." The court held that the distributon should be *per capita*, the court saying:

"There is nothing to indicate that the testatrix intended that those who were her nieces and nephews and also the nieces and nephews of her former husband, should take more than others."

NEW JERSEY.

In *Burnet* v. *Burnet*, 30 N. J. Eq., the will provided that the residue of the estate should be divided—

"*between* the children of Joseph H. Burnet and Benjamin F. Howell."

At the date of the will and also at the date of the testator's death, Joseph H. Burnet had four children and Benjamin F. Howell was living. There were, therefore, five residuary legatees. The court held that they took *per capita* and not *per stirpes*, saying:

"The established rule is that where a bequest or devise is made to a certain person and the children of a certain other person, the donees take *per capita* and not *per stirpes*, or, as a class, each taking an equal share. *Smith* v. *Curtis*, 5 Dutch, 345; *Fisher* v. *Skillman*, 3 C. E. Green, 229; *Pitney* v. *Brown*, 44 Ill. 363; *Blackler* v. *Webb*, 2 P. Wms. 383; 2 Jarman, 111, Hawks. on Wills, 113. This construction will yield where it appears, even faintly, from any other part of the will that the testator intended a different method of division should be adopted. This will affords no glimpse of such an intention and the division must, therefore, be by equal shares."

See also *Benedict* v. *Ball*, 38 N. J. Eq. 48; *Macknet* v. *Macknet*, 24 N. J. Eq. 277; *Thornton* v. *Roberts*, 30 N. J. Eq. 473; *Hayes* v. *King*, 37 N. J. Eq. 1; *Budd* v. *Haines*, 52 N. J. Eq. 488; *Stokes* v. *Tilly*, 1 Stockt, 120; *Fisher* v. *Skillman's Ex'rs*, 3 C. E. Green, 229.

NEW YORK.

In *Bunner* v. *Storm*, 1 Sandf. Ch. (N. Y.) 357, the testator directed that one-seventh of the estate should be equally divided among his three daughters, naming them, and the heirs of his deceased daughter Hester,

namely, T. S. B., and C. F. B., and that the furniture, etc., left to his wife, should, after her decease, be equally divided among his last named three daughters and the heirs of his said daughter, deceased. It was *held* (1) that the language of the will being plain and not ambiguous, using no doubtful terms or designation of objects requiring explanation to make them intelligible, extraneous evidence, although it was offered in the testator's own writing, was inadmissible to show that he intended to give to the two heirs of Hester together only one-fourth of the foregoing devise and bequest; and (2) that each of the heirs of Hester, as well as each of the surviving daughters, took one-fifth of the gift, and that the same was divisible *per capita* and not *per stirpes*. Many cases are cited in support of the Vice-chancellor's conclusion, among them being *Warrington* v. *Warrington*, 2 Hares' Report, 54, where the word '*between*' was used as referring to several.

In *Collins* v. *Hoxie*, 9 Paige (N. Y.), 81, the testator provided that his residuary estate should "be divided equally among the children of my sister Mary, my brother Solomon, and my brother John." The Chancellor, after saying that there might perhaps be some doubt whether the testator by this language intended the children of each should take an equal share of the residuary property, or that each of the children of the three should share equally among themselves, said:

"The settled rule of construction in such cases, however, seems to be that all the legatees take *per capita* unless there is something in the will itself indicating a different intention on the part of the testator. Thus, in *Blackler* v. *Webb*, 2 P. Wms. Rep. 383, where the testator, having had five children, one of whom had died leaving children, devised his residuary estate to three of

his surviving children and to the children of the other who was living and of the one who was dead, Lord Chancellor King decided that the grandchildren of the testator were entitled to take equally with the three children *per capita*, especially *as the parent of some of the grandchildren was living.* See also *Northey* v. *Strange*, 1 P. Wms. 143; *Butler* v. *Stratton*, 3 Bro. C. C. 367; *Wicker* v. *Mitford*, Harg. Law Tracts, 513."

In *Seabury* v. *Brewer*, 53 Barb. (N. Y.) 662, the testator by his will said:

"I wish my personal and real estate to be appropriated equally to the benefit of my wife Emily and of my children, Seabury and Florence."

The court said:

"We regard the law as too well settled to admit of a reasonable doubt in regard to the construction which this provision of said will should receive in determining the rights of the respective parties in a division of said estate. It is very clear that the parties named should take *per capita* and not *per stirpes*, and, therefore, each is entitled to one-third of the residue of the [illegible] er the dower interest of the widow is satisfied. [illegible] v. *Myres*, 23 How. Pr. Rep. 410, Justice Bo[illegible] well reasoned opinion, has fully and satisfacto[illegible]cussed this question. See also *Collins* v. *Hoxie*, [illegible]aige, 89; *Bunner* v. *Storm*, 1 Sandf. Ch. 358; *Murphy* v. *Harvey*, Edw. Ch. 131. There is not an expression contained in the will which is not in harmony with this construction or which indicates that the testator intended to make any other disposition of his property."

In *Myres* v. *Myres*, 23 How. Pr. Rep. 410, referred to in the preceding case, the direction as to the residue was that it was "to be equally divided *between* my son Thomas M. Myres, and the heirs of my son Melancthon W. Myres,"

and it was held after a full discussion of the authorities that the distribution must be *per capita* and not *per stirpes*, there being nothing in any other portion of the will suggesting any different understanding than must be given to it in a separate reading. The court in this case speaks of the significance of the word "between," as used in this will, as will hereinafter appear.

In re Verplanck, 91 N. Y. 439, the residuary clause of the will was:

"All the rest, residue and remainder of my personal property, I give and bequeath to my said nephews and nieces, the sons and daughters of my brother, John Henry, and my sister Elizabeth, to be divided equally *between* them. In case of the death of any such nephew or niece before me, what would have been his or her share, if living, I give to his or her issue, if any, equally. If there be none, then to the survivors of my last aforesaid nephews and nieces, and the issue of those deceased, *per stirpes* and not *per capita*."

The court said:

"Looking at the language of the residuary clause alone, according to every authority which has fallen under our observation, we would have to hold that the nephews and nieces take *per capita*. 2 Jarman on Wills, Randolph & Talcot's Edition, 75; *Ferrer* v. *Pyne*, 81 N. Y. 281; *Vincent* v. *Newhouse*, 83 N. Y. 505; *Hoxton* v. *Griffith*, 18 Gratt. 574; *Balcom* v. *Haynes*, 14 Allen, 204; *Risk's Appeal*, 52 Pa. St. 269; *Bivens* v. *Phifer*, 2 Jones Law, 436; *Lockhart* v. *Lockhart*, 3 Jones Eq. 205. In this case *the legatees are all of equal degree of relationship to the testatrix, and it is not to be supposed that she had any greater affection for, or interest in, one than in another.* So far as appears, *they all had equal claims upon her bounty and liberality. There is no natural or reasonable presumption that she intended to give one of her nephews and nieces, thus situated, any more than another. There is no reason*

to suppose that she meant to give one of the children of her brother more than four times as much as she intended to give one of the children of her sister."

See also *Lee* v. *Lee*, 39 Barb. 172; *Bisson* v *West Shore R.R. Co.*, 143 N. Y. 125.

NORTH CAROLINA.

In *Ward* v. *Stow* (1834), 2 Dev. Eq. (N. C.) 509, the direction of the will was that—

"all the remaining part of my estate, both real and personal, be equally divided amongst the heirs of my brother John, the heirs of my sister Nancy Stow, and the heirs of my sister Sallie Ward and my nephew Levi Ward."

At the death of the testator, his brother John and his sister Nancy were living; the former having four and the latter nine children. Sallie Ward was dead at the date of the will, having left two children, both of whom survived the testator, and of whom Levi Ward, the plaintiff and legatee, was one. The court said:

"The will declares that the property given to these persons shall be equally divided, and the one question that remains is between whom is this equality directed. Is it between the classes, or is it between the individuals of whom the classes are composed? Adopting the language of Chief Justice Taylor in 3 Hawks. 604, we think that there 'has been a settled construction upon all devises and bequests of this description recorded in a series of decisions to be traced back for more than a century,' which leaves us no liberty to speculate on this question. It can scarcely be necessary to swell the list of authorities to which he has appealed and which clearly sustains his position. We will add only the following cases to the very strong ones which he has enumerated."

The court then referred to a number of authorities and concluded that the distribution must be *per capita* and not *per stirpes.*

In *Waller* v. *Forsythe*, 1 Phill. Eq. (N. C.) 353, the bequest after a life estate was—

"to be equally divided *between* the children of said Nancy Waller (the life tenant) and my sons William and John."

Held that—

"the division must be *per capita.* Each of the children of Nancy take a share equal to the shares of John and William."

In *Johnston* v. *Knight*, 117 N. C. 122, the will provided

"and the balance of my estate, both real and personal, be equally divided *between* William T. Knight, Pattie McDowell and the children of J. P. and Margaret L. Sugg, and the children of Elisha McDowell."

Held that the distribution should be *per capita* and not *per stirpes*, the court saying:

"This has been the rule since *Ward* v. *Stow*, 2 Dev. Eq. 509, down to the present time, with numerous intervening decisions. The words 'equally divided' do not absolutely control in all instances, but yield only when other language of the will or the manifest intent requires it. The argument based on the justice and natural affection does not change the rule. That would disturb other parts of the will. Testators usually divert the line of distribution from that marked out by the law for descent and distribution and no doubt do so in the light of the surrounding circumstances."

See also the following other North Carolina cases applying or recognizing the same rule of construction:

Bryant v. *Scott* heretofore cited; *Cheeves* v. *Bell*, 1 Jones Eq. 234; *Lane* v. *Lane*, 1 Wins. 630; *Roper* v. *Roper*, 5 Jones Eq. 16; *Howell* v. *Tyler*, 91 N. C. 207.

SOUTH CAROLINA.

In *ex parte Leith*, 1 Hill. Ch. (S. C.) 151, the devise was:

"All the residue and remainder of my real and personal estate, wheresoever situated, to be equally divided in the following proportions, that is to say, two shares to my deceased sons' (William and James) children, to be equally divided among them."

Held that all of the children of William and James took equally *per capita*, the court saying:

"If the clause of the will out of which this question arises, be interpreted according to the natural import of the terms used, there would seem to be no doubt that they must operate as a devise or bequest of the testator's estate, to be divided between the children of his deceased sons, William and James, *per capita* and not *per stirpes*. They are described as one and not several classes. It is like the case of *Butler* v. *Stratton*, 3 Bro. Ch. Ca. 367, where it was held, that under a bequest to the descendants of two persons, all their descendants, as well grandchildren as children, take *per capita*."

See also the following additional South Carolina cases: *Campbell* v. *Wiggins*, Rice Ch. 10; *Allen* v. *Allen*, 13 S. C. 512; *Perdriau* v. *Wells*, 5 Rich. Eq. 20; *Wessenger* v. *Hunt*, 9 Rich. Eq. 459; *Dupont* v. *Hutchinson*, 10 Rich. Eq. 1.

TENNESSEE.

In *Seay* v. *Winston*, 7 Humph. (Tenn.) 472, the devise was of property, after the death of the testator's wife, to be equally divided *between* the children of the testator's brothers and of his sister. The court said:

"We do not think there is any serious difficulty in holding that the devise is to the nephews and nieces individually and not in classes, and that they, therefore, take *per capita* and not *per stirpes*, each individual being entitled to one equal portion of the bequest. We do not see that argument can make it plainer than the words of the bequest. * * *. Now, it is not his brother and sister that are the objects of his bounty, but his nephews and nieces, each of whom is equally near in blood to him and no doubt equally beloved by him; then there could have been no motive or wish to divide them in classes, whereby the division of the bequests might, and no doubt would, have been most unequally made and in which he expressly provides against."

See also *Kimbro* v. *Johnston*, 15 Lea (Tenn.), 78, where the bequest was of property—

"to be divided equally *between* A. E. Ford, Sally Taylor, Eleanor Malloy, Mary's daughters, James' daughters; my personal property to be divided *between* Ada Raines and A. E. Ford."

The court in determining that the distribution should be *per capita*, said:

"The will itself shows a selection by the testatrix of the objects of her bounty out of persons standing in the same relation to her with others of the same *stirps*. There is nothing, either in the will or the circumstances, to take the case out of the general rule."

See also *Puryear* v. *Edmondson*, 4 Heisk. (Tenn.) 43; *Ingram* v. *Smith*, 1 Head (Tenn.), 411; *Rogers* v. *Rogers*, 2 Head (Tenn.), 660.

EFFECT OF MARYLAND ADJUDICATIONS.

While it may be conceded that decisions of the Maryland courts, rendered since the cession of the District by that State, are not in general binding on the courts of the District of Columbia, it is suggested that such decisions are always very persuasive, and should be followed unless manifestly wrong. This is especially true where rules of property or rules for the effect and construction of wills, are involved. And in some instances they are to be regarded as binding in our courts.

In *De Vaughn* v. *Hutchinson*, 165 U. S. 566, it was held by this court that the rule in *Shelley's case* was applicable to a will devising real estate in this District, and the court applied the principle that it must look to the law of the State in which land is situated for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances. After noting that the land in controversy formed part of the soil of Maryland before the cession, this court said:

"We learn from the reported cases that the rule [in Shelley's case] as established in the jurisprudence of England before the American Revolution, was introduced into Maryland as part of the common law and has been consistently recognized and enforced by the courts of that State."

The court then cited a number of Maryland cases, beginning with one in 4 H. & J. (which is the very same volume of reports that contains the decision of the Mary-

land Court of Appeals in *Maddox* v. *The State*, upon which the Court of Appeals of this District largely relied in the determination of the case at bar), and concluding with a case in 60 Md.

Referring to these decisions, in another part of its opinion this court said:

"Though these decisions were made since the lands in question in this case became part of the District of Columbia, yet their reasoning is based upon the history of the law in Maryland ever since that State became independent, and we are, therefore, warranted in the conclusion that the law as laid down in the cited cases was the law when the State of Maryland ceded to the United States the territory now embraced in the city of Washington and District of Columbia. It is not claimed that there has been any legislation by the Congress of the United States which has modified or changed the law in this particular as it was when the lands in question were subject to the law of Maryland. Nor do we find that there has been any attempt by the courts of the District to lay down a different rule."

This language is particularly applicable to the case at bar, inasmuch as we have involved here a rule for the construction of wills which has been consistently followed in the State of Maryland from an early date in the history of the State, and would seem to show that the Maryland adjudications cited are not only to be regarded as persuasive but as binding on the courts of this District.

A fortiori, as compared with *De Vaughn* v. *Hutchinson*, we do find the courts in this District passing upon this rule of construction of wills, and we find our courts following the Maryland rule. See *Moffit* v. *Varden*, 5 Cranch, 68, and *Follansbee* v. *Follansbee*, 7 App. D. C. 282, heretofore cited.

In *De Vaughn* v. *Hutchinson*, this court also referred

to the fact that the opinion of the lower court was delivered by a judge who had been recently the chief justice of the Court of Appeals of Maryland. Similarly in this case, a judge (Chief Justice Alvey), who sat with the court in the determination of the case at bar, sat with the Court of Appeals of Maryland in the determination of *Brittain* v. *Carson, supra*, which is also relied upon by the lower court in the decision of this case.

Here we have at least two Maryland cases, namely, *Maddox* v. *The State* and *Brittain* v. *Carson*, on all fours with the case at bar, absolutely undistinguishable from it, so far as the language of the respective wills is concerned; and we respectfully submit that the Court of Appeals of this District was right in relying upon them as precedents and following the rulings made in them.

Significance of the Use of the Word "Between" in the Residuary Clause.

Counsel for Charles McIntire in his brief (page 9), contends that "the word *between*, without something to qualify its ordinary meaning, must be taken in its proper sense as indicating a division between two and not among six," and three cases, two in Pennsylvania and one in Missouri, are cited in support of such contention.

In sixteen of the cases cited in this brief, wills are construed in which testators have used the word "*between*" in referring to more than two legatees; and in one case (*Purnell* v. *Culbertson*, 12 Bush. (Ky.) 369, the learned judge who delivered the opinion of the court was himself guilty of this etymological lapse, if it be such. Nothing could better demonstrate, we submit, that the word "*between*" is colloquially and commonly used as synonymous with "*among*."

Judicial authorities are not lacking upon this subject

which differ radically from those cited by the opposing counsel. Thus in *Myres* v. *Myres*, 23 How. Pr. (N. Y. Supreme Court), 410, heretofore cited in this brief, it is said:

"It is suggested that the word '*between*,' as used in this will, has a different signification from the word '*among*"; that it carries an idea of a division into two parts, whereas '*among*' imports a division into many parts. I find, however, that '*between*' is often used as synonymous with '*among*,' especially when employed to convey the idea of division or separate ownership of property held in common. It is quite as appropriate to say that property is to be divided '*between*' A, B and C, as '*among*' A, B and C. So Webster says: 'We observe that "*between*" is not restricted to two'; and he illustrates thus: 'Twenty proprietors own a tract of land "*between*" them.' This word was used in several of the cases cited, yet it was not regarded as at all influential on the question of construction."

So in *Lord* v. *Moore*, 20 Conn. 122, the testator leaving a wife and four children gave the income of the residue of his estate to be equally divided "*between*" his wife and children, and it was *held* that the wife took a share of the income equal only to that of one of the children.

And so in *Farmer* v. *Kimball*, 46 N. H. 435, the court construing a residuary clause in which the word "*between*" was used with reference to several legatees, said:

"This construction is not controlled by the use of the word '*between*.' *Abrey* v. *Newman*, 17 L. and Eq. 126; *Lenden* v. *Blackmeer*, 10 Simons, 626; *Warrington* v. *Warrington*, 2 Hare, 54; *Williams* v. *Yates*, 1 C. P. Cooper, 177."

EFFECT OR ADMISSIBILITY OF EXTRANEOUS FACTS.

There is absolutely nothing in the context of the will indicating, however faintly, that it was the testator's intention to divide his nephews and nieces into two classes,

for the residuary clause is preceded only by a provision making a pecuniary bequest to each of his brother Edwin's children.

But it is urged in the brief of appellant that a certain extraneous fact is admissible as evidence, and that, if admitted, it will make clear that the testator's intention was that appellant was to receive one-half of this estate and his five cousins only the other half. This extraneous fact is that the testator's brother Charles, appellant's father, owed the testator $1,350.64, and had owed it to him since 1854, long before the will was made. And from this the conclusion is drawn on behalf of the appellant (page 8 of his brief) that the testator "sought to equalize the family of his two brothers by giving to the children of his brother Edwin the amount of his brother Charles' indebtedness, with interest from the year of its creation down to the date of the testator's death," and that "having in this mode given to the children of his deceased brother Edwin a sum equal to the *advancement* [sic] to his brother Charles, with interest, he then provides for the equal division of the *residuum* of his estate, and that *residuum* of his estate, when and after being thus equally divided, is to go to the two sets of children, those of his brother Edwin and those of his brother Charles."

This certainly seems to be traveling far into the realms of conjecture, and affords an illustration of the danger of admitting extraneous evidence under the circumstances surrounding this case, to show the intent of a testator.

We submit that such evidence is inadmissible. See *Weatherhead's Lessee* v. *Baskerville*, 11 How., p. 357; *Wilkins* v. *Allen*, 18 How. 385; *Mackie* v. *Stone*, 93 U. S. 583; *Kaiser* v. *Brandenburg*, 16 App. D. C. 16, and cases cited; *Bunner* v. *Storm*, 1 Sandf. Ch. 357; *Myres* v. *Myres*, 23 How. Pr. (N. Y.) 410; 1 Jar. on Wills (5th Ed.), pp. 509 *et seq.*

And the language of the court in *Bradford* v. *Bradford*, 6 Wharton, 244, is very appropriate here:

"The court must proceed on known principles and established rules, not on loose conjectural interpretations nor considering what a man may be imagined to do in the testator's circumstances."

But admitting, for the sake of argument, that this extraneous fact may be considered by the court, it is difficult to see how it supports the contention of the appellant. Edwin's children were *not* left a sum merely equal to the alleged indebtedness of Charles, but every one of Edwin's children was given that sum, making a total bequest to all of Edwin's children living at the date of the will of over $7,000 exclusive of interest. The contention was made below by the appellant and decided adversely to him, that the meaning of the will was that *all* of the children of Edwin together were to receive only $1,350.64 with interest. The Court of Appeals said on this subject (Record, p. 75):

"In construing the clause of the will giving to the children of the testator's brother Edwin the sum of $1,350.64 with interest accumulated at 6 per cent. per annum from July 1, 1854, to the date of the testator's death, the court was clearly right. The terms of the will are plain and admit of no doubt. The bequest is to *each* of them and is a first charge on the fund."

The appellant has abandoned his contention on that point, as will be observed by his assignments of error here.

Again, what he refers to in his brief as an "*advancement*" by the testator to his brother Charles, was not such, but was a debt evidenced by promissory notes (56) which had been due from Charles to the testator since 1854,

none of which had been paid, which was not forgiven by the terms of the will, and which became one of the assets of the estate on the death of the testator. It would be a very reasonable surmise that this unpaid indebtedness was one of the causes which led the testator to ignore his brother Charles in the final distribution of his estate.

(See the opinion of this court in the will case, 162 U. S. 383.)

And so it would seem to us, that this long unpaid debt of Charles, Sr., to the testator, so far from being an argument in favor of an intention to create two very unequal classes among nephews and nieces, rather brings the case within the reasoning of *Blackler* v. *Webb*, 2 P. Wms. 183, where the husband of one of testator's living children being in bad financial circumstances, the testator, instead of giving that daughter a share in his estate made a bequest directly to her children; and to indicate that it was the intention of David McIntire by his will, ignoring as he did his living brother and legal next of kin and the statute of distributions, to distribute his estate equally to his several nieces and nephews, all of whom were of an equal degree of kinship to him.

Reduced to its last analysis, the contention of Charles, Jr., would seem to be that, notwithstanding the plain and unambiguous language of the residuary clause of his uncle's will (which provides for an *equal* division of the *residuum* of his estate between his "brothers Edwin and Charles' children," which can only mean the same as saying in different words, his nephews and nieces), the testator meant to distribute such *residuum*, not equally between them, but unequally; that is to say, to give his brother Charles' two children one-fourth each and his brother Edwin's six children only one-twelfth

each, because, forsooth, in a previous part of the will he had given each of his brother Edwin's children a pecuniary legacy, while he had given Charles' children nothing. In other words, the court is asked not to construe this will, but to re-make it, giving to one of the legatees more than the testator plainly intended him to have, because of a supposed injustice on the part of the testator toward such legatee in the final distribution of his estate, which was, in fact no injustice at all for that legatee was not of his legal next of kin, his father, the testator's brother, being still alive.

That Edwin's children were the favorite nephews and nieces of the testator, having greater claims, as he thought on his bounty than the others, is apparent from the fact that in the first part of the will he gave them a sum of money which could only be determined by a calculation of interest from 1854, and then in the residuary clause provided for a distribution of the remainder of his estate, "*if any*" there might be.

PART II.

Third and Fourth Assignments of Error.

These assignments are directed to the action of the courts below in allowing counsel fees amounting to $11,500.00, paid to Mr. Henkle and Mr. Totten, who in turn defended this will in the attack made upon its validity by Charles McIntire, Sr., to be charged against the estate instead of charging such fees against the individual shares of Edwin McIntire's children. In other words, the appellant complains that he should not be compelled to bear one-sixth of these counsel fees, or about $2,000.

The litigation over this estate, commenced by Charles McIntire, Sr., and continued by his son, Charles McIntire,

Jr., both as his father's administrator and in his individual capacity as a legatee, dates back to June 5, 1885, when Charles McIntire, Sr., the brother of the testator, filed a petition for revocation of the probate of the will, alleging the exercise of undue influence on the testator, want of testamentary capacity, etc.; and from that time to the present, almost twenty years, he, and after his death, his son, the appellant, have sought incessantly to thwart the testamentary intentions of the deceased. It was absolutely essential that competent counsel should defend the will against the distinguished counsel on the other side, and Mr. Henkle, and after his death Mr. Totten, were employed, and no question has ever been made of the reasonableness of their charges for professional services. The first order of the court allowing counsel fees was dated March 5, 1886, and allowed Mr. Henkle $500 "to be charged to the distributive shares of" Edwin T. McIntire's children (15). This item will not be dealt with in this brief, as the Court of Appeals directed that it should not be allowed against the estate. The subsequent orders of the court allowing counsel fees were dated July 22, 1893, July 12, 1895, January 28, 1896, and June 1, 1896 (16–26). During all this time the assets of the estate were not in the control of the administrator *c. t. a.*, but were in the custody of Mr. Henkle or Mr. Totten, and of Mr. Carlisle, as "custodians," the latter being of counsel for the caveator. This explains why the administrator *c. t. a.* did not himself pay the counsel fees, and is perhaps an explanation of the provisional character of the orders allowing them. The orders provided that the several sums paid counsel should be charged against the shares of Edwin McIntire's children, without prejudice, however, to their right or to the right of the administrator *c. t. a.* to apply to the court, at the termination of the litiga-

tion touching the validity of the will, to have said allowances charged against the estate of the said testator. It will be observed that the requirement was not that the application should necessarily be in writing, but that the orders simply contemplated the question being raised at the proper time in the future by some sort of application, oral or written, as to whether the fees should be charged against the estate. When the assets of the estate were finally turned over to the administrator *c. t. a.* the fees had actually been paid out of the assets, and the question whether they should be finally charged against the estate was necessarily raised when he filed his account. It is an error to say, as in appellant's brief (page 24), that there was "no opportunity to any person in interest to be heard with respect" to these counsel fees. On the contrary, as stated by the Court of Appeals (Record, pp. 72, 73), "opportunity was given to present exceptions to the account, on that ground as well as others." The Court of Appeals, therefore, very properly regarded the final order approving the account and ordering distribution as amending or superseding the former orders of the court charging the interests of the several children of Edwin T. McIntire with the payment of these fees.

There were no technicalities of procedure in the old orphans' court. They have been rebuked when attempted there (Hignutt *v.* Cranor, 62 Md. 216; Munnikhuysen *v.* Magraw, 57 Md. 172). We submit that the presentation and auditing of the administrator's final account, in which the shares of Edwin T. McIntire's children were *not* charged with any part of the counsel fees, was a sufficient application to the court within the meaning of these several provisional orders, for the reason that ample opportunity was thereby given the vigilant appellant, which opportunity he most assuredly availed him-

self of, to present his reasons why the fees should not be charged against the estate. Having had this opportunity, and now conceding, as he practically does, that the administrator *c. t. a.* stands in the same position as an executor as to the right to employ counsel to defend the will, it is respectfully submitted that his objections are of such a technical character and so untenable as to require little or no consideration by the court.

But for the action of the appellant and his father, this estate would have been distributed nearly twenty years ago, and it would not be unjust if the caveatees were relieved entirely of the payment of counsel fees, made necessary by the attack on the will, and the caveators were made to bear the whole of that burden. But that has not been done, and the effect of the action of the court below is merely to require Charles McIntire, Jr., to bear only one-sixth of the burden. Manifestly, he has no reasonable ground to complain of such action.

We respectfully submit that the appeal of Charles McIntire, Jr., is without merit, and that the decision of the Court of Appeals, in so far as it overruled his exceptions and objections to the final account, should be affirmed with costs.

CHARLES COWLES TUCKER,
HENRY E. DAVIS,
WILLIAM HENRY DENNIS,
Attorneys for the Administrator C. T. A.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 84. Charles McIntire, Appellant and Plaintiff in Error,
vs.
Edwin A. McIntire, Administrator c. t. a. of David McIntire.

No. 85. Edwin A. McIntire, Administrator c. t. a. of David McIntire, et al., Appellants and Plaintiffs in Error,
vs.
Charles McIntire.

Appeals from and in error to the Court of Appeals of the District of Columbia.

[January 4, 1904.]

Mr. Justice HOLMES delivered the opinion of the Court.

These are cross appeals from the Court of Appeals of the District of Columbia. (See 14 App. D. C. 337.) To avoid all questions of form there are also writs of error on the same grounds. The appeal of Charles McIntire is from the overruling of exceptions to the final account of the administrator with the will annexed of the estate of David McIntire, and presents two questions, one of construction and one of administration outside the terms of the will. The probate of the will already has been before this Court. 162 U. S. 383.

The question of construction is the main one. It is whether the children of the testator's brothers, Edwin and Charles, take *per capita* or *per stirpes* under the residuary clause of the following will:

"January 7th, 1880.

This is my last will and testament.

I David McIntire. tin-plate worker, of this city (of) do will, bequeath, or devise, to my nephews, and nieces, that is to say, from July the first. 1st eighteen hundred and fifty-four. 1854

To the opening of. on reading of this, paper. one thousand three hundred and fifty dollars and sixty-four cents ($1,350.64) is to be calculated at six (6) per cent. interest

That amount whatever it may be is to be given to each of my brother Edwin's children. The remainder if any, is to be equally divided between my Brothers Edwin and Charles children. David McIntire."

There was an addition and also an earlier document of January 1, 1880, which it is unnecessary to copy. At the date of the will the brother Charles

was living and had two sons, Charles and Henry, the latter of whom died before the testator. The brother Edwin had died, leaving six children, one of whom died before the testator. The testator held promissory notes of his brother Charles for $1,350.63. The brother Charles also now is dead.

The argument for a division *per stirpes* is this. Earlier in the paper the testator had used the phrase "nephews and nieces," which it would have been natural to repeat had he intended to make a division *per capita*. But instead of that he says "my brothers Edwin and Charles children," which is not very different from "my brother Edwin's children and my brother Charles' children," and orders an equal division "between" them. "Between," if accurately used, imports that not more than two persons or groups are set against each other, *Ihrie's Estate*, 162 Pa. St. 369, 372; *Records* v. *Fields*, 155 Mo. 314, 322, and those groups are earmarked and shown to be regarded as groups by naming the parents from which respectively they come. The equality of division is an equality between the groups. See *Hale* v. *Hale*, 140 Mass. 267, 271. This mode of distribution has the recommendation that it follows the rule in cases of intestacy. *Raymond* v. *Hillhouse*, 45 Conn. 467, 474. See further *Alder* v. *Beale*, 11 G. & J. 123, explained in *Plummer* v. *Shepherd*, 94 Md. 466, 470. But the court is of opinion that the general rule of construction must prevail according to which, in the case of a gift to the children of several persons described as standing in a certain relation to the testator, the objects of the gift take *per capita* and not *per stirpes*. *Walker* v. *Griffin*, 11 Wheat. 375, 379; *Balcom* v. *Haynes*, 14 Allen, 204; *Hill* v. *Bowers*, 120 Mass. 135. The fact that one of the parents was living at the date of the will is deemed sufficient to exclude a reference to the statute of distributions. *Blackler* v. *Webb*, 2 P. Wms. 383; *Bryant* v. *Scott*, 1 Dev. & Bat. Eq. (N. C.) 155, 157. And with regard to the word "between," the will is an illiterate will, and as the popular use of the word is not accurate no conclusion safely can be based upon that. See *Maddox* v. *State*, 4 H. & J. 539; *Brittain* v. *Carson*, 46 Md. 186; *Lord* v. *Moore*, 20 Conn. 122; *Pitney* v. *Brown*, 44 Ill. 363; *Farmer* v. *Kimball*, 46 N. H. 435, 439; *Burnet* v. *Burnet*, 30 N. J. Eq. 595; *Myres* v. *Myres*, 23 How. Pr. 410; *Waller* v. *Forsythe*, 1 Phillips, Eq. (N. C.) 353.

The other error assigned on behalf of Charles McIntire is that the court charged the estate with $11,500, fees paid to counsel for services in defending the will against the attack of the said Charles and his father. The amount was paid in different sums by orders of court, in several instances on the petition of the children of Edwin, one of whom was the administrator with the will annexed, and was directed to be charged against the interest of those children in the first instance, but without prejudice to an application to have it finally charged against the estate. On the allowance of the account it was charged against the estate. We are of opinion

that the charge was proper. There is no contest over the amount. It was the proper business and duty of the administrator to defend the will, and he was entitled to a reasonable allowance for what he had to pay in doing so. The only just alternative would be to charge counsel fees as costs against the losing party, which would have been less favorable to the appellant. The general proposition is not disputed, but it is said that in this case the legatees retained the counsel and therefore ought to pay them. The other legatees as well as the administrator no doubt had a share in calling the counsel in. But that did not matter. The services were services to the estate in maintaining the testator's will, they were adopted by the administrator and the usual rule must prevail. It is said that there was no application to change the original order and no chance to be heard against it. But plainly this cannot be true. As observed by the court below, allowing the account changed the order and charged the fees on the estate. Whatever want of formality there may have been, the appellant had the right and opportunity to object and except to the account, as well on this ground as others, and he used it. The precise mode in which the allowance appeared upon the account is not material, but may be explained in a word or two. The payments were made by the solicitors of the parties while they had the assets in their hands, as will be stated in a moment. They rendered their account, crediting themselves with those payments generally. Then they turned over the assets, less these payments and their commissions, to the administrator. In the account of the latter he charges himself only with the net amount received by him, and makes no charge for the counsel fees against the legatees, and thus throws the burden on the residue of the estate.

The foregoing considerations dispose of the appeal of Charles McIntire. There is a cross-appeal by the administrator from the allowance of certain exceptions to the account. The first error assigned is that he was denied commissions. The reason was this. On February 19, 1885, pending the controversy on the will and other controversies, an order was made by consent of all parties, to the effect, among other things, that Edwin A. McIntire should act as administrator, "but without any allowance for commission or other charge for his services as such administrator," and that the assets should remain under the control of the court, (they having been paid into court under another order of the same date, passed in an equity cause.) The next year, all debts having been paid except a disputed note, another order was made by consent, turning over the assets to the solicitors of the parties. The funds were managed by the solicitors until the will was established, when on petition of the administrator offering to give an additional bond, the assets were put into his hands on July 7, 1896, upon his filing a bond for $100,000. It is argued that this restoration of the assets to the hands of the administrator with the duty of dis-

tribution and the requirement of a new bond, relieved him of the terms of the bargain on which it was agreed that he should act, if that bargain ever was valid. We think it enough to say that we perceive no such change of situation from what was anticipated as should have that result. Whether the bargain was good or bad, the services were rendered under it, and therefore purported to be gratuitous. The law does not forbid gratuitous services, even in fiduciary relations, and if acts purport to be done gratuitously no claim for payment can be founded upon them at a later date. See *Johnson* v. *Kimball*, 172 Mass. 398, 400, 401.

A partial distribution was made under an order of December 9, 1897, of $2,800 to each of the children of Edwin, and of $6,022.02 to Charles McIntire. Complaint is made because the sums paid to Edwin's children were charged against the legacies to them instead of against their share in the residue, whereas the payment to Charles was charged to his share in the residue, which was all he had. It is said that this mode stops the running of interest on the legacies to the disadvantage of the legatees. But we see no ground for complaint. Of course the liabilities of the estate in the form of legacies as well as those in the form of debts are to be satisfied before the residue exists. In the absence of a definite understanding at the time, partial payments naturally would be taken as working that satisfaction and as stopping the liability of the estate for interest. The same principle applies to another sum which four of the legatees agreed to treat as having been paid to them as stated below.

A third error alleged concerns $500, part of the counsel fees in addition to the sums mentioned above. This was paid upon a petition of Edwin's children, stating that the counsel "had been managing their interests," and under an order directing the same to be charged to their distributive shares without reserving any right to apply to have it finally charged to the estate. We are not disposed to overturn the decision that this payment must be borne by the legatees, as they were content to be charged with it in the order allowing the payment.

The next error assigned is that the administrator was charged with interest on an item of $10,000 from April 18, 1884, to February 25, 1885. This sum was alleged to have been received by the administrator and improperly omitted from the inventory. The matter was referred to arbitrators. In order to avoid a family quarrel, if possible, the four sisters of the administrator agreed to be charged with $2,500 each, as on a partial distribution, and gave receipts on February 25, 1885. Thereupon the administrator requested the arbitrators to find that he received and must account for the sum, and they did so. Very probably the matter of interest was overlooked, but the result of the transaction is that the administrator stands charged on the record as owing the estate $10,000 until the time of distribution to the sisters, and of course that he must pay interest at the

legal rate. It is not a case of charging interest not earned against an administrator having funds in his hands as such, but it is a charge against him for money which he ought to have put into his account and held as an identified fund, but did not. The motives which induced his consent to charge himself are immaterial. Whatever they were, the effect of the record is the same.

Finally, the administrator objects to being charged with interest on an item of $1,419.73, which he received in 1891. There is perhaps more doubt about this than concerning the more important matters, but we shall not disturb the decree. The assets had been ordered to be paid into court and then had been transferred, as above stated, to the solicitors of the parties as custodians. The administrator did not pay this sum over, but kept it in his own hands.

Decree affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.